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EXAMINING AGENCY USE OF DEFERENCE PART II

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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EXAMINING AGENCY USE OF DEFERENCE, PART II

THURSDAY, MARCH 17, 2016

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:02 a.m., in room 342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Portman, Ernst and Heitkamp

OPENING STATEMENT OF CHAIRMAN LANKFORD

Senator LANKFORD. Good morning, everyone, and welcome. I cannot imagine what anyone would rather do on a St. Patrick's Day than to be in a hearing with two redheads talking about judicial deference. Doesn't that just sound festive?

Let me welcome everyone here. This is Examining Agency Use of Deference, Part II, for us. This is an incredibly important issue. Today's hearing will focus on the practice of Federal courts deferring to agencies when it comes to their interpretation of statutes, more commonly referred to as Chevron deference.

The Constitution provides for three separate and distinct branches of government, each with a check on the others. As Chief Justice John Marshall stated in 1825, the Legislature makes, the Executive executes, and the Judiciary construes the law. Chevron blurs the traditional understanding of separation of powers by giving agencies the power to interpret the meaning of statutory ambiguities. Chevron deference has fundamentally altered how agencies regulate. Instead of simply carrying out the directives of Congress, agencies can seek out ambiguities in the law so they can address problems as they see fit. They do so knowing that the courts will likely take their interpretations, defer to them as permissible construction regardless of congressional intent.

Take for example, the Waters of the United States (WOTUS) Rule. Emboldened by the Chevron deference, the Environmental Protection Agency (EPA) expanded the Clean Water Act beyond anything contemplated by the enacting Congress to the detriment of landowners and farmers. With studies showing that traditionally Supreme Court justices defer to the agency's interpretation more than 70 percent of the time, the EPA knows that it would be very

unlikely that a Supreme Court would overturn the Waters of the United States Rule.

Its abdication of judicial power runs counter to the standard of review laid out in the Administrative Procedures Act (APA). The APA gives courts clear direction to decide all relevant questions of law and interpret Constitutional and statutory provisions. Chevron deference ignores this directive. Instead of courts using their judgment to independently decide all relevant questions of law, Chevron directs the courts to see their judicial obligation to decide questions of laws in favor of any reasonable agency interpretation.

In a 2006 empirical study, Cass Sunstein found that whether Supreme Court justices validated an agency's interpretation of a statute based on Chevron deference hinged largely on ideological factors. He found that both the Supreme Court and the Courts of Appeals apply the Chevron framework based on the judge's political convictions. For example, the most liberal justices are 27 percentage points more likely to uphold liberal agency interpretations of law than conservative agency interpretations. Similarly, conservative justices are 30 percent more likely to validate conservative agency interpretations of law than liberal agency interpretations.

Simply put, Chevron deference is a blank check for the Executive Branch to exercise its own brand of legislative authority with little or no accountability. This is not a government of the people, by the people, for the people—it's a government by bureaucracy. Congress should correct this constitutional imbalance by making it clear that agencies should not interpret legislative text beyond its plain reading and courts should rigorously scrutinize agency interpretations of statutory language to ensure congressional intent is followed. Doing so vindicates separation of powers principles and leaves Congress' legislative role intact.

It is in this light that I am pleased to join Senators Hatch, Grassley and Lee, in introducing the Separation of Powers Restoration Act of 2016. This bill, introduced today, amends the APA to clarify that courts may not defer to an agency interpretation of a statutory provision or rule. Ambiguities and statute are unavoidable, but when they do occur, courts, not the agencies, must determine their meaning.

I look forward to hearing from our witnesses, their ideas to address this issue in a way that respects congressional intent and upholds judicial independence. I have one other special guest that's here today, and I would ask the Ranking Member to be on her best behavior today because my wife is in the audience. She is normally pretty tough on me in hearings like this. So my wife, Cindy—we will be married almost 24 years—is also in the audience.

So with that, I would recognize the Ranking Member Heitkamp for her remarks.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman, and welcome. I just do not know how you have done it for 24 years, but we really congratulate you. And we will give special privilege to people who wore green. I do not know about the rest of you, but Mr. Cooper, you are in good shape.

Mr. Chairman, thank you so much for holding this hearing. This is really a quite heated topic here in Washington, D.C., and I think it is always good to get diverse opinions, always good to reexamine the law, always good to try and figure out where we are right now. And so I just want to make a few opening comments, but I look forward to the dialogue.

When an agency gets a law from Congress to execute, sometimes, in fact, many times, there is only one clear way to interpret or approach a statute, but that typically is not the case. In those situations where there is not one, clearway, the agencies have to do their best job in determining what was in fact legislative intent.

As I have said before, the legislative branch needs to do a better job when we write laws. For various reasons, we are not always clear in our intent or our expectation. Maybe it is because we do not want to make the decision and we want to kick the ball and the can down the road instead of actually doing the job that we were elected to do, which is resolve difficult issues of public policy.

I think that when we fail to consider a detail in the bill at all it becomes very difficult for agencies, very difficult for courts, and so my first plea would be that we do a better job, and in fact, when we find ambiguities, that we legislate. And one of the reasons why you do not see that happening the way it should is because we have a system that is in near gridlock in terms of just taking care of the peas and carrots, as you will, of legislation.

And so we are now engaging in a greater way, I think, judicial evaluation of the work that agencies do and the work that Congress does. And this is not a role I think that the Supreme Court, or any court at any level, particularly relishes, that of trying to arbitrate between some people's opinion of what happens in a statute and the agency's attempt to pass a statute.

But Chevron has been law for a long time, and I think that we need to appreciate that this was the law that basically evolved over a long period of time. And I think in many ways it was a statement by Congress that if you want clear direction, you ought to legislate clear direction and not count on the courts to be the arbitrator.

So Chevron, in my opinion, is not a free pass for agencies to do as they please. I want to—always popular to quote in these kinds of hearings Justice Anton Scalia, who said, "Any resolution of ambiguity by the administrating agency that is authoritative, that represents the official position of the agency, must be accepted by the courts if it is reasonable." Reasonableness has been the key, and in "Michigan v. EPA," just as an example, the court determined that the interpretation by an agency not to consider costs was anything but reasonable.

If Congress directs agencies to create policies that are legally enforceable, we should expect them to stay within the parameters that Congress has outlined. If they do not, I think the courts are ready to step in, and have proven their ability to do so. Replacing Chevron with something, I approach with great trepidation. We do not know what that is. We have had steady and sure law for the last 30 laws, and the legislative process, I think, becomes less certain as we move forward.

And I think, just to digress a little bit. If you look at what has happened with the infamous Waters of the United States, in every

case they overturned an EPA rule. So no deference. You did it wrong. But what happens when they overturn it with a 4–4–1? One person now is deciding what is Waters of the United States and everybody is trying to evaluate what he meant in that minority-concurring opinion, if I can put it that way.

And so it has created great disruption. We are now back in the same vein. Instead of Congress legislating, we continue to rail at the evils of judicial review, the evils of agencies, the whole while—when we should be pointing back at ourselves and say, what is the evil of not legislating in a clear manner what we intend the law to mean, especially when it is as important as a jurisdictional standard of Waters of the United States.

It is mind boggling, and I think in most States you do not have these problems because legislators tend to take their responsibilities seriously. And so I am very interested in this topic, very interested in how change would look for the courts. This is a court-adopted doctrine over a long period of time. They have refused to overturn Chevron. There is probably reason for that, even conservative courts.

And so this is going to be, hopefully, a great discussion, but I am going to be asking questions about how would the change be effectuated and how would a change be realized, and if you are going to have courts that have complete de novo jurisdiction, do we have enough courts to evaluate all the facts?

And so with that, I turn it back to the chairman, and look forward to the dialogue.

Senator LANKFORD. At this time, we will proceed to testimony from our witnesses. Neomi Rao is an Associate Professor of law and Director for the Center for the Study of the Administrative State at George Mason University School of Law. Ms. Rao served as Associate Counsel and Special Assistant to President George W. Bush. She also worked as Counsel for the U.S. Senate Committee on the Judiciary. She clerked for Justice Clarence Thomas in the U.S. Supreme Court, and practiced international law at Clifford Chance, LLP.

Charles Cooper is the founding partner and Chairman of Cooper & Kirk, recognized as one of the Nation's top litigators. Mr. Cooper has appeared before the U.S. Supreme Court multiple times. Prior to entering private practice, Mr. Cooper served in the Civil Rights Division of the Justice Department and as the Assistant Attorney General for the Office of Legal Counsel. Mr. Cooper clerked for Justice William Rehnquist, later Chief Justice, on the U.S. Supreme Court.

Michael Herz is the Arthur Kaplan Professor of Law at Cardozio; is that right?

Mr. HERZ. Cardozo.

Senator LANKFORD. Cardozo. I apologize for that—School of Law. At Cardozo he has served as Senior Associate Dean and Vice Dean. He has clerked for Associate Justice Byron White of the U.S. Supreme Court and is former chair of the American Bar Association's (ABA) section of Administrative Law and Regulatory Practice.

I would like to thank all of our witnesses for appearing before us today. It is the custom of the Subcommittee that we swear in

all witnesses before they testify, so if you do not mind, please stand and raise your right hand.

Do you swear this testimony that you will give before the Subcommittee will be the truth, the whole truth and nothing but the truth so help you, God?

Ms. RAO. I do.

Mr. COOPER. I do.

Mr. HERZ. I do.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect all witnesses answered in the affirmative.

We are using a timing system today. You will find that this Committee is into more conversation and fact-finding than we are exactly sticking by the letter of the clock law. So we will start with Ms. Rao, and we will have a 5-minute clock there that will wind down a little bit as we go, and be as close as you would like to, but we are not going to stick by it strictly today. How about that? Ms. Rao, you are up.

TESTIMONY OF NEOMI RAO,[1] ASSOCIATE PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Ms. RAO. Great. Thank you. Chairman Lankford, Ranking Member Heitkamp, and Members of the Committee, thank you for the opportunity to testify on this important issue. My focus today will be on the relationship between judicial deference to agency decisionmaking and the extensive delegation of lawmaking authority from Congress to the agencies.

The tremendous growth of the administrative State and the expansion of the powers of the Executive Branch have raised alarms at the Supreme Court and elsewhere. Administrative agencies now exercise a powerful combination of lawmaking, execution and adjudication functions. Operating under open-ended delegations, agencies have significant discretion as a practical matter to make the law. While the executive power undoubtedly includes discretion to implement and to interpret the law, the Executive Branch must always act pursuant to statutory or constitutional authority and has no independent authority whatsoever to make law.

The Constitution indeed vests all legislative powers with Congress. The administrative state has required loosening and sometimes the abandonment of these constitutional restraints. Notably, the Supreme Court will allow almost any delegation of authority, from Congress to the Executive, under its intelligible principle test. In addition, the Supreme Court has developed various and somewhat chaotic doctrines of deference to agency interpretations of ambiguous statutes. I think it is difficult to reconsider deference without also revisiting delegation. Deference in part was an understandable reaction to the fact that agencies often operate with a significant degree of statutory discretion and so courts hesitated to step in to question agency policymaking.

Yet, delegation to agencies, combined with deference to agency interpretations, has allowed for much of the administration to operate outside of the checks and balances of the Constitution. In recent opinions, Chief Justice Roberts and Justices Thomas and Alito

[1] The prepared statement of Ms. Rao appears in the Appendix on page 29.

have each drawn a connection between delegation and deference, and indeed, the need for courts to provide an independent check on agencies.

It is interesting to note that both the non-delegation doctrines in Chevron are forms of judicial restraint. Although many rationales and defenses are provided for these doctrines, I want to focus on one formalist assumption for judicial restraint in this area. The Court has argued repeatedly that the structural rivalry between Congress and the president will keep the branches within their constitutional limits. Therefore, because Congress and the president compete for control over lawmaking, Congress will not delegate too much.

In this understanding, courts can leave enforcement of the non-delegation principle to the institutional competition between the branches. Similarly, the Court, and in particular, Justice Scalia, have defended Chevron deference on these same grounds. In a case from a few years ago, he argued that deferring to agency interpretations would not allow Congress to enlarge its own power.

And so both the flaccid non-delegation doctrine and Chevron deference are judicial approaches that assume the political rivalry between Congress and the Executive will adequately protect constitutional limits without vigorous judicial review. Yet it turns out that in a modern administrative state, this assumption is mistaken or at last significantly incomplete. In addition to transferring significant authority to the Executive, delegation has fractured the interest of Congress as an institution because in part, it provides an opportunity for Members of Congress to influence the administration. This dynamic stands at odds with what I have termed the collective Congress, which in some ways is an analogy to the unitary executive.

Quite simply, Article 1 vests all legislative powers here in a Congress, not in one House committee or member. Collective lawmaking is really the cornerstone of representative government. It provides the mechanism by which representatives serving different interests come together and enact laws for the general good.

This collective mechanism also aligns the interest of lawmakers with the institution of Congress. Delegation, however, unravels the collective Congress and it undermines Congress as an institution. And when that happens, Congress may fail to check the overreach of the Executive, and then judicial deference compounds this and simply reinforces the problem.

So if Members of Congress and agencies are more likely to collude rather than compete over administrative discretion, the structural rivalry between the branches will not work to limit power. And when the structural checks fail to constrain, judicial review becomes all the more imperative. Judicial power indeed includes the power and the duty to exercise independent judgment when reviewing agency actions and interpretations.

The deference framework, such as it is, requires serious consideration by the courts and perhaps by Congress through reforms of the Administrative Procedure Act (APA). Yet, I would point out that the courts cannot remedy the problems of administrative overreach on their own. Judicial review plays an essential part in keeping the branches within their constitutional limits. Judicial review

is not the exclusive mechanism for this. The political branches have far more effective means to check each other, and real reform will require action from Congress, the Executive and the courts.

Thank you.

Senator LANKFORD. Mr. Cooper.

TESTIMONY OF CHARLES J. COOPER,[1] PARTNER, COOPER & KIRK, PLLC

Mr. COOPER. Thank you, Chairman Lankford, and thank you, Ranking Member Heitkamp. It is a real pleasure to be here, and I want to thank both of you for inviting me to discuss this very important subject matter this morning.

As Chief Justice Roberts has recently lamented, the Framers could hardly have envisioned today's vast and varied Federal bureaucracy and the authority administrative agencies now hold over our economic, social and political activities. The Chief Justice added a warning about the danger posed by the growing power of the administrative State, and the danger he had in mind was the danger to our liberties, our individual liberties that the separation of powers was designed by the Framers to protect.

The modern administrative state has become a sovereign unto itself, I would submit to the Subcommittee, a one-branch government whose regulatory grasp reaches into virtually every human activity. The focus of my remarks this morning will be on Chevron and Seminole Rock, two judge-made doctrines of judicial deference to agencies that have placed the administrative state's regulatory power, I would submit to you, on steroids.

Now, Chairman Lankford has previously described those doctrines and I will not repeat that here in the interest of time. But I will say that both of the doctrines have been extended to the full reach of their logic in the decade since they were announced. Time is too short to walk through the various precedents following Chevron and Seminole Rock, but the bottom line, I submit to you, is that these two cases, and their progeny, have transformed the administrative state into a kind of super court, vested with the last word—binding even on the Supreme Court—as to the meaning of ambiguous statutory and regulatory provisions in those areas where those doctrines are applied.

Since the early part of the 20th Century, the administrative state has been permitted to accumulate and exercise legislative, executive and judicial power, despite the Constitution's careful and exclusive allocation of these powers to the Congress, the president and the courts. And, although the powers wielded by the administrative state are vast, it is essentially politically accountable neither to Congress, nor for the most part, to the president.

Chevron and Seminole Rock exacerbate these serious separation of powers concerns by ensuring that the administrative State also largely escapes meaningful legal accountability to the courts. I believe that these doctrines of deference are at war with the Constitution's separation of powers, and for that matter, also with the original design of the APA itself, as Chairman Lankford alluded to in his opening remarks.

[1] The prepared statement of Mr. Cooper appears in the Appendix on page 44.

Turning first to our Constitutional system. As Alexander Hamilton wrote in the Federalist No. 78, the interpretation of the laws is the proper and peculiar providence of the courts. Accordingly, it's been clear, at least since "Marbury against Madison," that the authority to conclusively say what the law is is a judicial power, one that Article 3 vests exclusively in the judicial department, not the executive. And since the Constitution does not give the legislative branch any share of the judicial power, Congress cannot delegate that power or any part of it to an agency.

It follows, I would submit to you, that the courts must retain the sole authority to issue binding interpretations of law. Chevron and Seminole Rock, by licensing the wholesale transfer of this authority to agencies, are at war with Article 3. To be sure, this analysis assumes that when an agency purports to resolve a statutory or regulatory ambiguity, it is exercising interpretative—and by that I mean judicial, essentially judicial power.

And there are some scholars and jurists—and I think we will hear from one momentarily—who dispute this assertion, arguing instead that in such cases the agency is exercising legislative authority implicitly delegated by Congress, and I too agree that that is a much more reasonable way to understand the rationale of Chevron.

But I think that any attempt to justify Chevron and Seminole Rock on that ground runs headlong not into Article 3, but into Article 1 of the Constitution, which vests all legislative powers exclusively in Congress, powers that under the original design of the Constitution cannot be delegated.

And I have just another minute or so, Mr. Chairman, if you will.

Senator LANKFORD. Yes, sir.

Mr. COOPER. And although the non-delegation doctrine has lain largely dormant since the 1930s, we just heard that the Supreme Court's continuing reluctance to police the line drawn by the Constitution between legislative and executive power cannot deprive Congress of its authority—indeed, I would submit to you its responsibility—to recognize and maintain that critical constitutional boundary. That is equally the responsibility of this Congress to do so.

The constitutional problems created by Chevron and Seminole Rock, as I mentioned earlier, are of the judiciary's own making. Congress never intended that the courts defer to agency legal interpretations. Indeed, I think that much is plain from the text of Section 706 of the APA previously quoted by the Chairman. It instructs the reviewing court to decide all relevant questions of law, to interpret any statutory provisions and determine the meaning of the terms of an agency action, such as a regulation.

That language is imperative, commanding the that courts shall decide all questions of law. Yet under Chevron and Seminole Rock, the agency under review, not the reviewing court, authoritatively decides the relevant questions of law. Chevron and Seminole Rock, I believe, it cannot be reconciled with the original design and the test of Section 706.

I want to close by urging Congress, and I think welcoming Congress' consideration of this important question and congressional reforms designed to abrogate Chevron and Seminole Rock for those

reasons. I do not think there can be any question that Congress has the power to do so. Both Chevron and Seminole Rock purport to be rooted in the background presumption of congressional intent to delegate these authorities to the agencies.

So Congress clearly has the power to rebut that presumption by language, language that this Committee and this Congress will have to frame in a way even more explicit than Section 706 already is so that it is inescapably clear to the courts that deference is not what Congress contemplates.

And thank you, Mr. Chairman. Thank you again, Ranking Member.

Senator LANKFORD. Thank you. Mr. Herz.

TESTIMONY OF MICHAEL HERZ,[1] ARTHUR KAPLAN PROFESSOR OF LAW, CARDOZO SCHOOL OF LAW

Mr. HERZ. Chairman Lankford, Ranking Member Heitkamp, Members of this Subcommittee, it is an honor to appear before you today. I have been teaching and writing about administrative law for almost three decades, and like all professors of administrative law, I have spent an inordinate amount of that time grappling with Chevron. Whatever other effects Chevron may have, it has been great for law professors.

And I am suspicious of, but reconciled to, Chevron. I am suspicious because, exactly as the chairman said in his opening remarks, judicial review of administrative action, in particular judicial review to ensure compliance with statutory limits and commands, is an essential pillar of our constitutional democracy. One would not want to send agencies out into the world to do what they want. They are creatures of statute. They have only the authority Congress has given them. They must comply with congressional limits, and judicial review is essential to ensure that they do so.

I completely agree with all that. That is a long-standing understanding of how our system works. And the question is whether Chevron throws that overboard or not, and I would suggest it does not, that properly read and applied, Chevron retains and respects the courts' essential role in this regime. The doctrine is messy. It is inconsistently applied, like all doctrines, but at the end of the day, Chevron is not the threat that has been described.

I want to just say a couple of things drawing on my submitted testimony, and then a couple other things, and then I will stop. If Senate testimony had titles, mine would be "What Chevron is Not." Let's think about the real Chevron, not a caricature. And so a few things that Chevron is not.

First, Chevron is not judicial abdication. First of all, there are a whole bunch of situations where Chevron just does not apply. There is an agency interpretation out there and the court more or less ignores it. At the Supreme Court level, that is the vast majority of cases. In lower court level, that's less true, but still true.

Second, when Chevron applies, courts do a lot of work in what we call step one, the step where they are trying to figure out, did Congress address this issue? They do more work—they spend more time in step one than you would think from reading Chevron itself,

[1] The prepared statement of Mr. Herz appears in the Appendix on page 70.

where Justice Stevens, in, I think, a completely infelicitous phrase, says that the court should determine if Congress had an intent on "the precise question at issue," and if there is nothing, we are off to step two, and defer.

Congress almost never had an intent on the precise question at issue, at least in a case that is actually litigated to judgment. That is why there is a lawsuit. And Congress cannot be expected to anticipate, to have a clear specific intent about, every application of the statute. But Congress still may have answered the question, and courts realize that and spend a fair amount of time in step one. That is what courts should be doing.

And finally, step two, when deference kicks in, it does not involve handing the judicial role over to agencies, as Mr. Cooper said. My view is that what is happening in step two is not fairly called interpretation. A court gets to step two because it concludes the statute does not answer the question. "We could come up with an answer," says Justice Stevens—paraphrasing—in Chevron, "but we would be making it up." There is just not an answer in the statute, and at that point, when law has given out, it is not really a legal question. There is a policy judgment to be made, and if it is a policy question, better it should be made by the agency, which has some expertise and electoral accountability and is exercising delegated authority from Congress, than by courts.

For that reason, I do not think there is anything unconstitutional about Chevron. But the key thing that I think is emerging from the testimony of all three of us today is actually a certain common ground about where the problem lies. The issue is about delegation more than it is about interpretation, and this resonates a little with the Ranking Member's opening comments. The constitutional argument based on Article 3, I think, is completely meritless, and I am not sure how strong either of my fellow panelists think it is. They seem more focused on the Article 1, non-delegation argument. That seems to me a completely plausible argument. Absolutely, what Chevron rests on is a frank acknowledgement that Congress hands a lot of power to agencies and does not answer a lot of questions.

Now, is that constitutional? The other two witnesses think it is not, and of course, the court's doctrine here is famously toothless. I disagree, but that is not our question today, the non-delegation doctrine. The key point from a Chevron point of view, if I could just take one more minute—the key point is to see that if you get rid of Chevron, if all review is de novo and nothing else changes, statutes are still just as unclear. Law still gives out.

It just means that courts will be inventing answers and calling it interpretation instead of agencies. That does not give Congress any more power. It arguably gives Congress less power. And the underlying problems are exacerbated rather than ameliorated. I will stop there. Thank you so much.

Senator LANKFORD. Thank you, all three of you. It will just be an open dialogue today, back and forth, and so feel free to jump in at any point. We will be able to talk through this.

Mr. Herz, let me pick up right where you left off there. Your statement there about courts will invent answers without a Chevron type structure, what would prohibit courts, when they get to

a decision where they have stated in the past for Chevron that the policy questions, the agencies have the greatest expertise in that area, the courts are more generalists, what would deter a court from instead of inventing an answer to saying this is an answer that Congress did not address, and so Congress needs to write a statute on it, so until Congress writes a statute on it, there is not a law on this?

Mr. HERZ. Well, obviously, the question is going to arise in different circumstances. In many settings, it is clear that Congress has given regulatory authority to the agency. Take the Waters of the United States, or take Chevron itself, and the question is, what is the flexibility the agency has and what is the scope of that authority? Someone has to say what are Waters of the United States? The statute just is not much help. What the statute actually says is you need a permit for a discharge into navigable waters, and then weirdly, it defines navigable waters as waters of the United States.

The legislative history suggests that what Congress wanted to do was reach to the greatest extent of its constitutional authority, but that is the legislative history. There is just not a lot to work with there, whether you are an agency or a court, and the court cannot just say, oh well, the agency has no authority under the Clean Water Act. It is inescapable that it has to regulate.

Senator LANKFORD. There is not the ability for the court to be able to step back and say this is unclear at this point, the Congress needs to give clarity on this, so we cannot move beyond this point of what has been done until we get greater clarity? Going back to the Ranking Member's statement before——

Mr. HERZ. Right.

Senator LANKFORD [continuing]. That Congress has the responsibility to be able to define this, if Congress failed on its responsibility, shouldn't Article 3 push back and say Article 1 needs to do their job?

Mr. HERZ. Yes. I think there are two approaches the court might take if it shared that concern. One is in the setting where the statute applies directly to private conduct as opposed to a statute that tells the agency to do something, and then the agency——

Senator LANKFORD. Correct.

Mr. HERZ [continuing]. Statute that applies to the agency, there is a due process issue. A really vague statute, like a really vague regulation, if we just do not know what it means, is unconstitutional under the due process clause, indeed that could be a regulation or a statute.

But the more common Chevron setting is we are talking about what this term means as it applies to the agency, and then it is just a non-delegation issue. What you are suggesting is a non-delegation doctrine with teeth. The court is saying to the Congress, you just did not decide the question, go back and do it right, because this——

Senator HEITKAMP. I think in the Courts' experience, many times when they do do that, they do not get an answer. I am going to point you to a case that I was involved in called "Quill," the famous multi-state tax case. The court deferred to Congress and said, yes, we can make a determination whether this is in violation of the

Interstate Commerce Clause. We are going to do that, but the Congress has control over the Interstate Commerce Clause. That case was decided in 1992.

We now have had a whole growth of remote sellers accessing markets in competition with other sellers and no answer. And recently, Justice Kennedy, in a concurring opinion on a tax anti-injunction case, basically said, we are tired of waiting for Congress. And so you take a look at all these contentious issues, whether it is Dodd-Frank, whether it is the Affordable Care Act, they are full of ambiguities that, quite frankly, if I were on the Court, I would be tired of cleaning it up. I would be tired of hearing it. I would be saying Congress is not doing its job under delegation.

Now, Mr. Cooper, you said something that I thought was really interesting. You said this is binding on the Supreme Court. I had to laugh when we were talking about Cardozo, because every first-year law student loved reading a Cardozo opinion because they were all so well written and fun. So he is fairly famous for first-year law students.

But also first-year law students, says none of this is binding. Chevron is not binding on the Supreme Court. The Supreme Court could reverse Chevron tomorrow. They could change the doctrine tomorrow, right? I mean, can we all agree as lawyers that is true.

Mr. COOPER. True.

Senator HEITKAMP. So why don't they? If it is in violation of Article 3, which should be the province and the concern of the Supreme Court in terms of their range of responsibilities, why don't they reverse Chevron? They have been asked many times to do that. And it has been conservative and liberal courts that have dodged that question.

Mr. COOPER. Ranking Member Heitkamp, I find that many of your comments resonate very well with me. I completely agree that much of the problem in this area has been Congress'——

Senator HEITKAMP. It is right here.

Mr. COOPER. It is Congress' inability really to focus and answer difficult political public policy questions. And that has led to, in the absence of a non-delegation doctrine, Mr. Chairman, essentially, to wholesale legislative lawmaking at the agency level in a way that I do not believe is consistent with our separation of powers.

You are right, the Chevron case is judge made. It can be judge unmade. I cannot really tell you why it is that the courts have, in my opinion, through Chevron, through Seminole Rock, abdicated their judicial responsibility, but I do believe it has led to a problem of constitutional dimension that is well within this body's authority.

When I say that agency interpretations or agency lawmaking are binding on even the Supreme Court, well that is the necessary result of Chevron if it is honestly applied. If you are deferring to an agency's decision——

Senator HEITKAMP. But if the court did find that in violation of Article 3, wouldn't the court make a correction? Wouldn't the court reverse Chevron?

Mr. COOPER. Yes.

Senator HEITKAMP. I am with Mr. Herz. I think that the issue here really is delegation. It is really who all ultimately gets to de-

cide. And I think that the biggest problem that we have is the lack of political courage and political will to make the tough decisions. We move them to the agency. The agency looks at this, and depending upon how you view the agency, either says we have to decide this or goodie, we get to decide this.

And so the agency now has built up a whole lot of we are not going to ask Congress for clarification. We are just going to do it because we are not going to get it from Congress. So we do, I have a real concern about delegation of legislative authority.

Mr. COOPER. Yes.

Senator HEITKAMP. I do not discount that at all. My problem is that when we look to who should be fixing that, it should be the entity, the branch of government that is being infringed upon, which is the U.S. Congress. And it should not be about telling the Judiciary what judicial doctrines they should be applying, but telling ourselves it is time to do our job.

Mr. COOPER. Well, not——

Senator HEITKAMP. And so why is that not the answer, I guess, rather than telling the court, you cannot apply Chevron?

Mr. COOPER. I think Chevron tells the agencies that Congress' job is yours and we are not going to interfere. I think that is what Chevron says. And I very much welcome Chairman Lankford's observation that when, as Professor Herz puts it, when a statute does not answer the question, when law has given out—in other words, Congress has not legislated on the subject at issue—it would be, in my opinion, the proper judicial response to say, there is no law, there is no law before me as a judge to apply.

And that is a delegation issue, to be sure, that would require a robust non-delegation doctrine. But the Congress would simply say—excuse me—the court would simply say the agency's answer is the agency's answer, it is not Congress, and Congress is the one that has Article 1 obligation and authority, an obligation to decide this question.

It is Congress who is politically accountable to the people, and if they do not like what Chairman Lankford or Ranking Member Heitkamp have done, they can call them home and do something about it. That is not the case with agency legislation. So yes, that would be, to my mind, Mr. Chairman, a perfectly legitimate, and the appropriate judicial response. When law has given out, there is no law.

Senator LANKFORD. So the challenge that we have is Congress only acts when it has to. If there is a deadline, if there is some imposing reason to act, then Congress acts because the pressure of the American people come on for action. And Congress has found over the previous several decades the ability to be able to hand off to agencies, to someone else, to take that action.

And the challenge is now, I think the courts are also doing the same thing. Courts are now saying, well, this is also something handed to us, but we are going to hand it to someone else as well. And everyone is passing around the hot potato here, when ultimately, we have to push this back to do your job, do your job, do your job. If you do not do your job, no one else can do your job.

And Congress is not doing its job because it has found a way to be able to hand off to the courts, or to the Executive Branch, a way for their job to be done by someone else.

Mr. COOPER. And if the courts stopped playing that game, and if Congress required them to do so, to essentially use the common canons of statutory construction to decide ambiguous questions, and sometimes to decide there is no law here, law has given out, if they did that, then there would be no choice but for it to come back to Congress and this body to——

Senator LANKFORD. And put the pressure back on everyone to actually get the task done. And that becomes a key issue. The challenge that I have with this as well is when the Court treats statute as they do the Constitution—and that is open to interpretation in the sense of, the Constitution, of course, was a broad written document, 200-plus years old. Of course, they could not speak to cars. Of course, they could not speak to airplanes.

And so you look at an EPA Clean Air Act, or a Clean Water Act, and say, well, Congress, of course, did not know about this 40 years ago, so what would they have done if they would have known about that? When this begins to open up and to say there has not been a policy statement made on this because at the time that Congress did not know about this or chose not to act on this statement, it seems to be an interpretation of the process for the court to say, what did the Congress mean if this would have been true at the time rather than what does the policy say?

Does that make sense?

Mr. COOPER. It does to me.

Senator LANKFORD. Mr. Herz, go ahead.

Mr. HERZ. So I will just make three very quick points in response to this. First, to my ear, Mr. Cooper is asking for a level of legislative specificity which simply is impossible to achieve. That is to say, law will always run out at some point. Congress cannot possibly—no drafter, no instructor—can possibly anticipate everything.

If my wife tells me, go out and get some milk, and now I am at the store and suddenly, wait, a quart, a half-gallon, skim, 2 percent, whole? She did not tell me. Is that unconstitutional? No. I figure it out, that is always going to be the case. And if she said a quart, then I still have the skim question, et cetera. There will always be something. And so it cannot be——

Senator LANKFORD. Correct.

Mr. HERZ [continuing]. Just that, any uncertainty means, oh it is an unconstitutional statute. We do not want to make your job harder than it already is.

The second thing is that the key thing, I think, to bear in mind is Chevron is about the allocation of authority as between courts and agencies. And if the problem is over delegation, it does not matter which one of those is exercising the delegated authority. If the problem is Congress has not decided something, agencies can make it up or courts can make it up. That is still a problem constitutionally.

And then just the third thing, just as you said, Senator Lankford, courts can do some crazy things, right? I mean, you are worried about agencies, but you can also be worried about courts. The Sunstein article you mentioned in your opening remarks, abso-

lutely shows an ideological influence in Chevron, but the question is always, compared to what? There is obviously an ideological influence without Chevron as well, and many studies show that. Getting rid of Chevron is not going to abandon, and may actually exacerbate, the ideological influence that is in the courts.

Senator LANKFORD. Right.

Senator HEITKAMP. Can I just make a point that, Mr. Cooper, there is a whole range of decisions agencies make. I would put Waters of the United States over here, because it is a jurisdictional question. It is a threshold, baseline question in terms of legally. I think legally you have complicated facts given hydrology, given everything that they do. But that is a tough question.

On the other side is tank car rules, right, tank car rules that say we need to make the railroad safe, we are moving a lot of oil on tank cars, we need to reinforce these, we did not engage early enough, now these are the new standards for breaking in tank car rules.

Does the court really want to evaluate the gauge of the steel of the tank car, or do they want to defer to the agency? And I understand the difference between, interpretations of law and the implementations of law. But it goes back to what Mr. Herz is saying, those would be two examples. At some point in the middle, the vast majority of the issues are going to be in the middle. And if we litigate and kick back to Congress everything in the middle and the court says, now Congress wants to rehear this because we just passed a law that says if you do not like what the agency has done, kick it back to us, I fear for the union given what I have seen since I have been here.

And so, I mean, I think Mr. Herz, your milk example is right on. I mean, you forgot organic or——

Senator LANKFORD. Except maybe you should just call your wife and she would tell you what it is.

Senator HEITKAMP. She might tell you and then you knew you were supposed to get organic. But I think because the regulatory world has become so complex, it just becomes so extraordinarily difficult. And that is just my point.

Senator LANKFORD. Let me make one comment, too. And Senator Ernst just joined us as well. I want to bring in Ms. Rao on this, because there are different ways—we talk about Chevron. There are different ways to do this. The permissible construction that is Chevron, compare that to the Skidmore most persuasive and as far as the different thresholds of giving deference. Because there will be deference.

I get the milk illustration, except there is a pushback to say at some point, I did not get clarity, let me go check in with who originally gave the orders here at this point. When we deal with a most persuasive versus permissible construction, what do you think the boundaries are of that when you deal with statutes?

Ms. RAO. I do think Skidmore and Chevron present different standards. Because in Skidmore, the Court is really still retaining the authority to say what the law is, and they take into account the practice of the Executive Branch, or their interpretations. And so I think that does leave more power with the courts.

I think also, in relation to the discussion that we have been having, I think one thing is important to note, which is that this idea that when law gives out, either the agency has to make it up or the Court has to make it up. I think that in many instances that that is not quite right, because there is another answer. I think, as Mr. Cooper said, which is, the Court can simply say there is no law here, which doesn't necessarily mean it goes back to Congress. It can also just go back to the agency, right, to do something that is within the law, and they do not necessarily have to redefine steel standards to say that the steel standards are not within the statute.

So I think it is not the case that you are always replacing judicial policymaking with agency policymaking.

Senator LANKFORD. Right.

Ms. RAO. It just may be that there is——

Senator LANKFORD. That could be a statement of the State needs to rule on this or there needs to be another statute, or you need to be within the bounds of the statute.

Ms. RAO. Right.

Senator LANKFORD. But this is not spoken to in a specific year.

Ms. RAO. That's right.

Senator LANKFORD. This is not the authority of——

Ms. RAO. I think the idea that one or the other has to make it up has a very strong assumption that is pro-regulatory, which is someone has to do something. And I think in our system of government that is not the case, right, if there is no law under which a government actor can act, then nothing happens. And if Congress actually wants regulatory action, then they may have to make some changes.

Senator LANKFORD. Senator Ernst.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. Thank you, Mr. Chairman. I appreciate this. This is such an important topic. We are spending a second Subcommittee hearing on this, and I want to thank the witnesses for being with us today.

Mr. Cooper, I would like to start with you, because I want to expand a little bit on this discussion that is going on right now. And notwithstanding the legislation that is in front of us today, and Senator Lankford has been really championing that, what, in your opinion, would be considered the ideal deference balance? A lot of different opinions out here, but what would you think is the ideal balance?

Mr. COOPER. Well, earlier, the chairman mentioned, and Professor Rao spoke to, the Skidmore standard. I think the Skidmore standard would be an acceptable one to me, because I believe that basically it is a court saying, taking all of the available information bearing on the meaning of this law in front of me, including the persuasiveness of the agency's analysis, what is the correct answer to the question at hand? What is the correct answer?

The most recent, I think, Chevron decision from the Supreme Court was "King against Burwell." And the Court rejected application of Chevron, and once it rejected application of Chevron on the theory that well, this is a question of such surpassing economic and

political consequence within the statute, we are not going to apply Chevron. Well, what was the question then? What is the correct legal answer? What is the correct interpretation of that provision, 36B of the ACA? I think that is the question.

So what are the typical sources of evidence that the Court calls upon to determine the meaning of a statute? I could cite to you the traditional canons of construction, because that is what they use, for example, at Chevron step one, and that is what they used purportedly—I think, erroneously, profoundly erroneously—in "King against Burwell". But the Court purported to apply there the traditional canons of statutory construction to find out what is the correct meaning, not what is a plausible meaning, and therefore, we accepted and deferred to it.

Senator ERNST. And then what, in your opinion, too, would be the guidelines as far as a timeframe? If you take a look at an act that was passed 10, 20 years ago, and regulatory agencies are continuing to develop regulation for something that was passed so long ago, do you see that as an issue? And I would use the Clean Water Act and what we see going on with WOTUS right now.

When does that timeframe start to interfere with OK, well, we understand the original construct, the intent of those legislators to make sure that waters that were covered were navigable waters, well now it has gotten to a point we are including Iowa. 97 percent of dry land is now considered waters of the United States.

Is there a timeframe that should be considered in that, or, how would you respond to that?

Mr. COOPER. I do not really look at it so much in terms of timeframes, as if there is some kind of temporal limit or range within which Congress has provided the law that is to be applied. I do believe that the advance of technology and the advance of, information in our understanding sometimes presents new questions that old statutes do not answer and that that is why this body is a continuing one.

And then, obviously, because there are new and pressing questions, regulatory agencies with general jurisdiction over those subject matters will naturally feel they need to provide an answer even in the absence of congressional guidance or seizing upon congressional statutes that really do not provide the adequate standards to guide and channel their decisions.

So I think I grasp the concern that you have here. I do not have specific comments, Senator Ernst, on the Waters of the United States problem that has come up. Frankly, I have not studied that specifically and carefully. I think my colleagues may have. But my general answer to you is that in law, new problems arise every day in areas in which there is legislation but that that legislation does not answer. Then it becomes your job.

Senator ERNST. I would agree. I think there is a point in time and that we can have all kinds of discussions about that, but we need to revisit the topics. And I guess my opinion would be that it is Congress' job to take a look at the way things have progressed through the years. Are we still following the original intent of the law? If not, Congress needs to revisit that, not an agency making, 10 years of changes to rules and regulations to keep up with the times.

I think at some point it needs to come back to this body for a second look. And then we set now the new intent of whatever act we might decide to pass.

Mr. COOPER. And may I——

Senator ERNST. Yes, go ahead, please.

Mr. COOPER. I just wonder if on this question of navigable waters there was a time when that word was perfectly serviceable in a regulatory context and in a judicial context. What led to the events that now allow that word to cover 97 percent of your State's dry land?

Senator ERNST. Exactly.

Mr. COOPER. Something is not right there. And I think that was an aggressive interpretation and application beyond the place where Congress could reasonably have intended for that word to extend. So if that is the case, then it seems to me that it may well be Congress' obligation now to define it with greater specificity.

Senator ERNST. Absolutely. I agree. And do you mind if I——

Senator LANKFORD. Go ahead.

Senator ERNST. One more. I am sorry. We will keep going, because I want to jump in a little bit further there. But in talking about the change and taking legislation—and it eventually changes over the years or is implemented—but just 3 days before the Supreme Court overturned the utility Mercury and Air Toxic Standards (MATS) rule, EPA Administrator McCarthy bragged to HBO's Bill Maher that the Supreme Court's decision would not matter because it took 3 years to get the Supreme Court to act, and by then, her quote, "The investments have been made".

Unfortunately, most of our Nation's facilities were forced to already comply with this rule before it was overturned by the Supreme Court. And I point out this quote because this is the main concern that I have with deference, is that we have agencies that are able to really push their own agenda knowing that the investments will be made before there is time for the court system to react to that. So they really are getting their agenda through without going through the court system. They can get those investments made.

And that is exactly what I think will happen with WOTUS, is that people will go ahead and make the investments and they will start putting the regulations in place before it actually makes it through the judicial system.

Any thoughts on that? And I would open it to any of you.

Senator LANKFORD. Can I make just a quick comment on that to add to what you are saying on it? Christopher Walker is assistant professor of law at Ohio State University. Did a study, and he just basically inventoried seven different Federal agencies and their regulators there, asking questions. He found that of the regulators that are in those seven agencies, 94 percent of them knew the term "Chevron deference" by name.

So what Senator Ernst is talking about, to say that there is this sense within the agencies that they are familiar with this doctrine, know it, and know that they are promulgating rules, are aware that, hey there is a chance I am going to get Chevron deference on this, that is a big issue when you've got 94 percent of the folks making regulations that know what Chevron deference is——

Senator ERNST. I understand that.

Senator LANKFORD [continuing]. Specifically. So I apologize for interrupting.

Senator ERNST. Yes. No, thank you very much.

Senator LANKFORD. I wanted to add to that.

Ms. RAO. Yes, Senators, I do have some thoughts about that, which is, I think you are absolutely right that it is the case agencies often rely on the fact that there is a long lag for litigation, and even at the end of the litigation process, there is a good chance that the courts will defer to what the agency has done. And even if they do not, as you say, the investments have been made.

I would also want to flag another problem, which is that agencies often can take actions that affect private industries without going through rulemaking. So they have all sorts of ways of kind of forcing investments that are not even challengeable in court, right? So you have the problem of regulating by speeches or by, FAQs that they post on their website.

And if you talk to people in industry, they say, well, we need to do what the head of the agency said in their speech, even though it has not gone through any process and there is no way to challenge it. And so, there is a problem of deference. And there is also a problem that these agencies just act like general lawmaking bodies where they can say something and expect people to comply, which is, I think, an even further problem.

Senator ERNST. Right. Certainly. Thank you. Mr. Herz.

Mr. HERZ. So I am not going to dispute that agencies sometimes get out of control. The agencies do, right? All institutions abuse their authority from time to time. But I think that some of the most recent comments have moved us away from, and are not good examples of, whatever the abuses produced by Chevron may be.

So to the extent agencies are regulating by speeches or regulating by press release, that may be a problem. It is not a Chevron problem because those do not get Chevron deference. The black letter law is no court would give Chevron deference to those. So if they have an impact, it is not because of Chevron.

Likewise, Michigan against EPA may well illustrate something that went profoundly wrong, but the court set aside the regulation in Michigan against EPA. It did not defer, and therefore, it cannot be a very good example of a Chevron problem. It may be an example of another problem, but Michigan against EPA reminds us, as I said in my initial comments, that actually courts do set aside agency action under Chevron. It is not a complete rubber stamp.

And then with regard to WOTUS, obviously, the 97 percent figure is pretty astonishing. I am surprised by it, but I defer, so to speak. Assuming it is true, I think a court will and should strike down that regulation under Chevron. If it really is affecting 97 percent, it is inconsistent with Congress' intent and with the statute. And so that is the work Chevron does. Some teeth remain in judicial review, notwithstanding Chevron.

Senator ERNST. Thank you. Thank you very much.

Mr. COOPER. May I just make the point that I really do disagree with the notion that, for example, the regulation at issue in "Michigan against EPA" was not a Chevron problem? I do believe that Chevron is well known by every regulatory agency, that Chevron

essentially licenses those regulatory agencies to not try to find the correct answer, and I understand that that cannot be found with respect to a lot of the enactments, Madam Ranking Member, that Congress puts forward.

But with respect to even those where there is a correct answer, that is not something the agencies have to find or even have to look for. They only have to look for a plausible answer, and I do believe that that ensures that they will regulate to the limits and beyond the limits of what is plausible in obedience to whatever their regulatory agenda is.

Mr. HERZ. I half agree with that.

Mr. COOPER. And yes, there will be occasions when they so far exceed it that they go beyond even what is a plausible interpretation of Congress' meaning, in the case of ambiguity, that the courts will say, well, no, we have to step in here. But that is a Chevron problem, in my opinion.

Mr. HERZ. If I could just very briefly half agree with what you said, even though I would be expected to completely disagree.

Senator LANKFORD. Is that a 49 percent agree or a 51 percent?

Mr. HERZ. I think it is 51. In the interest of bipartisanship, it is 51. As everybody knows, there has been a lot of empirical work done to try and find a Chevron effect in the courts. Are courts, in fact, upholding agencies more often or less often than before Chevron or than in a hypothetical world without Chevron? And by and large, those findings have indicated that if you look at outcomes, you do not see a significant effect. In the Supreme Court, absolutely not, but the Supreme Court is the Supreme Court. They do what they want.

But even in the lower courts, which is a more complicated picture, but basically, if you just count outcomes, it seems like Chevron does not have much impact. I will say, there is a lot of work that suggests it does not matter what the standard of review is. Agencies get upheld 70 percent of the time regardless of standard of review, and if that is right, we should just end the hearing now and all go home. I mean, we are wasting our time.

The obvious conclusion to this is to say, "ah, see, Chevron does not matter. Courts are not giving away the store". The response is exactly what Chuck was saying, and the Chris Walker article you cite as an example of this. There is an older article by Don Elliott that makes the same point—I forget the cite; Don Elliott was general counsel of EPA in the first Bush Administration—that says agencies are taking more and more aggressive interpretations because they know they are protected by Chevron.

And to the extent that is happening, then if the affirmance rate remains the same, that does not mean Chevron is not having an effect. Chevron is having an effect. And that is where one would really need to look. I think the Walker article is a good one. I think more work needs to be done there to get an empirical answer, but that is the critical point.

Senator ERNST. Thank you very much. Thank you, Mr. Chairman.

Senator PORTMAN. First, I want to thank Chairman Lankford and Ranking Member Heitkamp, one for holding this hearing, and for continuing to probe on this issue, as we have in a number of

other hearings, but second for their deference to other Members of the Committee to be able to ask questions, because, we all have 20 things going on at once.

But this is a fascinating topic for us to grapple with. I just left the Farm Bureau where we talked about Waters of the United States, and you know, we talked about the EPA regulations, and there has been discussion today, I am sure, about immigration and the Affordable Care Act and the fact that the agencies in promulgating their rules are playing a bigger and bigger role in our lives.

I thought your Ohio State professor analysis of the number of people in the agencies who know what is going on with regard to the specific issue of Chevron deference was interesting, but the fact is, it is almost like we have this fourth branch that is playing a bigger and bigger role in all of our lives.

So we have talked a lot about Chevron today. I think that is important. I think the Office of Information and Regulatory Affairs (OIRA) doctrine is just as important, and I think that is something—if you do not mind, I would like to probe just for a second. There is a bill that I have introduced in every Congress that I have been here in the Senate, and it is called the Regulatory Accountability Act. Some of you have been involved with that, and I appreciate your work on it. It was something that this year Senator Angus King and I introduced. It is bipartisan. It has been in the past. And it is really the first time I think in almost a half century that we have had some significant reform, if we can get it passed in the EPA, which is really where a lot of this should rest in my view. I was looking at the Administrative Procedure Act and, what did it mean and how does it apply to our current situation?

The judicially created deference in Chevron, Seminole Rock, OIRA and so on, I think has taken us away from some of the checks and balances that our Founders intended, but also what is in the APA. So under the Regulatory Accountability Act, judicial deference to the agency's interpretation of its own regulations changes. It is not automatic.

And I think this again is really an important part of what we are talking about that does not get as much attention as the agency in being able to interpret its own regulations. It would be based on the persuasiveness and the thoroughness of agencies' reasoning behind it. It would also repeal this OIRA deference in that regard. And this bill, by the way, has the support now of over 80 groups, including some you would expect, like the National Association of Manufacturers, the Chamber, the Business Roundtable, but also a lot of scholars, a lot of former public officials, some officials who have been involved with OIRA over the years on both sides of the aisle.

So my question to you, I guess, would be—and if you do not mind, Mr. Cooper, since I know you have been spending a lot of time on this issue, Section 706 of the APA again, it is the law of the land—says, quote, "The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

That is in law. And Scalia wrote in "Perez v. Mortgage Bankers Association," that the Supreme Court has been quote, "Heedless of

the original design of the APA" in, quote, "its elaborate law of deference to agency interpretations of statutes and regulations."

We have talked a lot about Antonin Scalia in the last few weeks. This is one where I think he got it right, that you need to go back to the APA and look at what it says, and it does not seem to fit with some of this. So I guess I would just ask you, Mr. Cooper, do you think that the APA itself is, as it was originally intended and written, is at odds with Chevron, Seminole Rock and for that matter, the deference that is established in OIRA?

Mr. COOPER. Senator Portman, thank you for that question. And yes, I do. And I have tried to outline my thoughts in some detail in the written submission that I have provided to the Subcommittee. But I do think the language of 706 is quite imperative. It makes clear that it is the courts' responsibility; the courts shall interpret all statutes. And it is equally clear with respect to agency actions, including, obviously, regulations.

I find it extraordinary, really, extraordinary that the Chevron doctrine and the Seminole Rock, now Auer, doctrines have proceeded with no one really particularly noticing that this is very difficult to square with the plain language of the APA, the congressional statute that governs the administrative process and judicial review of the work of the administrative agencies.

So yes, I do agree. I have suggested earlier in my testimony that I believe that amending Section 706 now is in order to use language that cannot be ignored and cannot be escaped by the courts to abrogate both Chevron and Seminole Rock.

Senator PORTMAN. Well, I appreciate that, and that is what we intend to do in the Regulatory Accountability Act, is to make more clear what I think is already clear, as Justice Scalia has said, in the very language of the APA. But, frankly, it is a new world, and there have been new, as I said, fourth estate intrusions on what I think is rightfully both in the legislative and in the judicial branch, and that is understandable.

It is a more sophisticated economy and society and there are lots of issues that have come up. But the question is, how can you be sure that we do have that appropriate balance that, again, I think goes back to the Founders, but certainly you can take it right back to the Administrative Procedure Act and Section 706.

On this issue of notice and comment rulemaking, someone said that the agencies rely on Seminole Rock deference to expand their authority without going through the process of notice and comment. You may have talked about this earlier today, and I apologize, I did not hear it, but do you think that the Seminole Rock deference influences the behavior of agencies or agency staff, and do you think it creates an incentive for agencies to take advantage of ambiguous terms and statutes that they are asked to administer?

Mr. COOPER. Senator Portman, I certainly do. I do not see how it could not, I mean, human nature being what it is. The notice and comment procedure required under the APA is one that is designed to ensure that the agency solicits and considers all of the information that it can from the public in order to ensure that its decisions made pursuant to congressional statute are reasonable, never arbitrary and capricious, and are as close to congressional design as possible. That is its purpose.

If to whatever extent under Seminole Rock it can regulate in a vague and general way, it then has freed itself from essentially the binds of notice and comment rulemaking because once it has a general regulation and it is free under Seminole Rock to interpret that regulation in a way that the courts must defer, it has given itself an entirely new flexibility to effectively make law.

And I cannot cite to you—perhaps my colleagues on either side who study this day in and day out—I am always intimidated frankly when I am with the professors of administrative law.

Senator HEITKAMP. You do not seem very intimidated.

Mr. COOPER. I do not study the agencies day in and day out. I sue them day in and day out, and so Chevron, honestly, is typically my enemy in that litigation. And I confess my bias upfront, but I cannot cite to you particular episodes when Seminole Rock has been abused in the fashion that I am suggesting it has, but I do agree with Justice Scalia that it is happening.

Senator PORTMAN. I am over my time here, but I will say, the other issue that we—at least I have not addressed, that I saw in Ms. Rao's testimony, you addressed, which is, right back to us. I mean, Congress has, I think you said "passed the buck." Because we do live in a more complicated, difficult world, and it is easier to say, we are not going to figure out how to deal with this in the statute. We are just going to give it to some expert in an agency. And I think Congress has a role here too in writing statutes that provide more guidance and clarity.

And thank you all very much. Thanks for the deference, Mr. Chairman.

Senator HEITKAMP. I mean, we see this over and over again. As Senator Portman said, and as I said in my opening comments, this abrogation of responsibility that we see in Congress, whether it is getting Government Accountability Office (GAO) reports or Inspector General (IG) reports and not following up, not holding people accountable, not coming together to try and clarify. Think about the cost of the litigation of Waters of the United States, and we are operating in uncertainty.

A lot of people are happy for the stay. I am happy for the stay. I have a bill that changes this. It has become so difficult to actually legislate in a toxic environment. But the one point that I want to make is that so many people look at this as a partisan issue. This is a structural issue. This is a constitutional issue, and you have to balance it. And you can say, well, this is all designed to get even with somebody's agency, but I go back to the Massachusetts case that directed EPA to begin to look at regulating carbon. They made a decision. That decision was not given deference, and now we are in the clean power plan regime.

This is not about partisan politics. This is about the balance of authority and power, and as we live in a more complicated world with less ability to make simple decisions here in a complicated environment and hand over those simple decisions, say good luck, I think a fair amount of agencies who would be watching this would say, look, you didn't give me enough direction. You want me to do my job and regulate and you have not told me what to do, and so what am I supposed to do? I just throw up my hands and say, not going to meet the statutory requirement to get these regulations

out in time, so I am going to get dinged on that, but I do not know what you intended, and this is a lot more complicated, and we cannot take it back.

And so I want to just say this has been very stimulating. And I think we will continue this discussion. But I want to put it in the context of this is not a liberal/conservative decision. This is a constitutional issue about balance of power and delegation, and we approach it that way. We may not agree. I mean, I quite frankly, think if the Court does not like Chevron, reverse it, give us a different standard. I do not feel obligated to reverse Chevron for the courts. The courts can reverse Chevron. But I do feel obligated to start identifying those areas that we in Congress have an obligation to clarify these ambiguities and take that responsibility seriously.

And so thank you. You have been a very engaging and enlightening panel.

Senator LANKFORD. Thank you. Let me do a quick wrap up, and I have one last question as well. It is interesting to me, as recently as yesterday, I met with some leadership from the Corps of Engineers about a piece of statute that Congress passed last year, or actually, 2 years ago in this particular piece. And we walked through the details of it, and their comment, because my question to them was this has not been implemented, and they said, well, we are going to try to get with you and your staff, because we do not have good parameters of what to do with this. We know the intent. We do not know how to do it.

And so they were literally coming back as an agency, back to Congress to say, we need additional help and additional legislation to provide us greater clarity. They were not willing to make a guess to try to determine what is permissible construction. In some ways, it was gosh, this seems very plain to me, and the other way, I thought, OK, let's have the conversation, what is missing?

But it forced that conversation, exactly what we have talked about. They were not going to move on permissible construction because they were not confident 100 percent of what we needed. And so they were coming back to us on it.

Let me ask this last question on this, and I know I am going to open up Pandora's Box with it, but I want to try to limit our time on this, because you have all been terrific to be able to walk through these issues. If we were to pass something or to try to lay something before the courts and say the reviewing courts should review the meaning of statutory provisions de novo, what happens? Mr. Herz.

Mr. HERZ. So I am speaking off the top of my head.

Senator LANKFORD. I understand. That is what professors do.

Mr. HERZ. Right.

Senator LANKFORD. You draw from your experience.

Mr. HERZ. Yes, but also I am very nervous because I am sitting next to a real lawyer. First of all, I do not think there is any doubt about the constitutionality of such a bill. Congress has the authority to pass such a law under the Constitution. In essence, as Senator Portman was pointing out, it did so already in 706. This would be a modification of 706.

Second, I think that it would be only partially effective, because to say de novo review, as I would read it, seems to say not only not Chevron, but not Skidmore. Skidmore came up earlier. Just de novo, on your own, ignore the agencies. Apart from the fact that I do not think courts should do that, I do not think courts would do it. The idea that courts should take agency view seriously is a very old idea. It did not start with Chevron.

And it is imbued in the judiciary, and it is a kind of natural instinct, and I think an appropriate instinct. So my guess is that courts would continue to pay some attention to what agencies had to say. I do think it would shift the law and shift the practice. But I do not think it would actually produce pure de novo review in reality. Compliance with Skidmore, is impossible to police. A Court can say oh, we are applying Skidmore, but we are not persuaded, and who knows if they were or not, right?

But likewise, compliance with de novo would be impossible to police. They could say it is de novo, but in fact, they might take the agencies quite seriously. I think they probably would.

Senator LANKFORD. Thank you. Other comments?

Mr. COOPER. I would just add, I really do not think de novo—first of all, I would welcome that amendment to 706 and I would be delighted, as this Subcommittee continues to explore how best to address this problem if you conclude ultimately, Ranking Member, that it is a problem.

But I do not think that de novo review would require that the courts blind themselves to what the agency has said. I think they could and would review that in the same way they would review the amicus briefs and briefs that are before them in terms of what does this mean? Using again the usual canons of statutory construction, what is the correct answer, as the court put it in "King against Burwell"? And looking to see how the agency itself has analyzed that question would be illuminating.

It would be illuminating in the same way that a brief before them is illuminating. If to the extent it persuades, it persuades. To the extent it does not, it does not.

Senator LANKFORD. Ms. Rao.

Ms. RAO. Sure. I think one of the difficult things about legislating the standard of judicial review, in my understanding, is that the proposal is to try to restore the Court's independent judicial review of agency action. And I am not sure if the term "de novo" captures that, and I am not sure what language would necessarily capture we want you to exercise your traditional independent role of judicial review.

Because frankly, the independent judgments and judicial review are kind of a complex matter, right, very hard to sort of spell out. And so like the others, I think that it is a great thing for Congress to think about and consider, how do we sort of get the APA to say we meant what we said in the APA originally? But what precise language is used I think is maybe harder to pin down.

Senator LANKFORD. Yes, welcome to Congress.

Ms. RAO. Yes.

Senator LANKFORD. Why we end up with laws that are ambiguous as well, because of interpretation on the other side. I appreciate all of your input, your preparation for this and being a part

of this conversation today and bringing this to the national conversation. This is a long-term conversation. It is not new to today, as you know very well. As you talked about, often this comes up in the classroom setting as well.

This one we have to find some sort of resolution for, because I think the trend line is, this continues to get fuzzier as time goes on rather than clearer. And so if we can provide some sort of clarity to this in the direction that it goes, I think we continue to drift.

So I appreciate very much the overarching conversation. Any other comments, Ranking Member.

Senator HEITKAMP. Just that it is all about staying in your lane. What is the lane? And we have not defined the lane. I agree with Professor Herz. We have the ability to do that, but so does the Court have the ability to decide, and probably with more certainty and quicker. And I think at some point here they are going to have to revisit Chevron and either make the modification or the clarifications that give the message that this is not unfettered discretion. You do not have unfettered discretion.

And I think a lot of people look at Chevron, say that is what Chevron means; you just check the box. Well, there are hundreds of cases out there where Chevron applied, resulting in the overturning of a rule or a regulation. And so we cannot say that it is unfettered discretion.

And so the question becomes, how do you fix the problem of overreach? How do you fix the problem of lack of clarity? And Congress has to do its job, which is to legislate and protect its prerogatives, which is in fact legislating and not over-delegating the responsibility.

And rather than telling the courts what to do, I would like to have a discussion broadly with my colleagues about what we are supposed to be doing, because I think that is really where the rubber meets the road.

Senator LANKFORD. And I would agree with the Ranking Member on that one. And hopefully we can work through some legislative solutions and have some things that would be resolved. That——

Senator HEITKAMP. Because that is not painful.

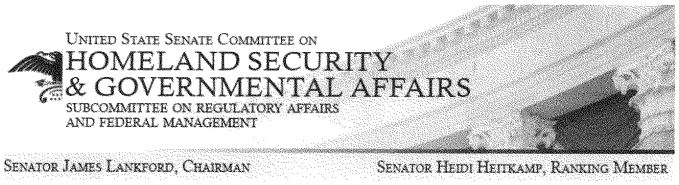
Senator LANKFORD [continuing]. Clearly the Congress' responsibility. Before we adjourn, I would like to announce that on April 12, the Subcommittee will examine efforts to improve USAJobs' website and hold a hearing later in April reviewing the rulemaking records of independent regulatory agencies.

That concludes today's hearing. I would like to thank the witnesses again for their testimony. The hearing record will remain open for 15 days, to the close of business on April 1—no kidding on that one—for the submission of statements and questions for the record.

With that, this hearing is adjourned.

[Whereupon, at 10:29 a.m., the Subcommittee was adjourned.]

APPENDIX



March 17, 2016

Opening Statement of Senator James Lankford

Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management Hearing titled:

"Examining Agency Use of Deference, Part II"

Good morning and welcome to today's Subcommittee hearing on "Examining Agency Use of Deference Part II." Today's hearing will focus on the practice of federal courts deferring to agencies when it comes to their interpretations of statutes –more commonly referred to as *Chevron* deference. The Constitution provides for three separate and distinct branches of government, each with a "check" on the others.

As Chief Justice John Marshall stated in 1825, "the legislature makes, the executive executes and the judiciary construes the law." *Chevron* blurs the traditional understanding of the separation of powers by giving agencies the power to interpret the meaning of statutory ambiguities. *Chevron* deference has fundamentally altered how agencies regulate. Instead of simply carrying out the directives of Congress, agencies can seek out ambiguities in the law so that they can address problems as they see fit. They do so knowing that courts will likely defer to their interpretation as "permissible construction," regardless of congressional intent.

Take, for example, the Waters of the United States rule. Emboldened by *Chevron* deference, the EPA expanded the Clean Water Act beyond anything contemplated by the enacting Congress- to the detriment of landowners and farmers. With studies showing that traditionally, Supreme Court justices defer to the agency's interpretation more than 70% of the time, the EPA knows that it would be very unlikely that the Supreme Court would overturn the Waters of the United States Rule.

This abdication of judicial power runs counter to the standard of review laid out in the Administrative Procedure Act. The APA gives courts clear direction to "decide all relevant questions of law" and "interpret constitutional and statutory provisions." *Chevron* deference ignores this directive. Instead of courts using their judgment to independently "decide all relevant questions of law," *Chevron* directs courts to cede their judicial obligation to decide questions of law in favor of any reasonable agency interpretation.

In a 2006 empirical study, Cass Sunstein found that whether Supreme Court justices validated an agency's interpretation of a statute based on *Chevron* deference hinged largely on ideological factors. He found that both the Supreme Court and the courts of appeals apply the

Chevron framework based on the judges' political convictions. For example, "the most liberal justices are 27 percentage points" more likely to uphold liberal agency interpretations of law than conservative agency interpretations. Similarly, conservative justices are 30 percent more likely to validate conservative agency interpretations of law than liberal agency interpretations.

Simply put, *Chevron* deference is a blank check for the executive branch to exercise its own brand of legislative authority with little to no accountability. This is not government of the people, by the people, and for the people – it is government by bureaucracy. Congress should correct this constitutional imbalance by making it clear that agencies should not interpret legislative text beyond its plain reading and courts should rigorously scrutinize agency interpretations of statutory language to ensure congressional intent is followed. Doing so vindicates separation of powers principles and leaves Congress's legislative role in tact.

It is in this light that I am pleased to join Senators Hatch, Grassley, and Lee in introducing the Separation of Powers Restoration Act of 2016. This bill, introduced just today, amends the APA to clarify that courts "may not defer to an agency interpretation of a statutory provision or rule." Ambiguities in statute are unavoidable, but when they do occur, courts, not agencies, must determine their meaning.

I look forward to hearing from our witnesses' ideas to address this issue in way that respects congressional intent and upholds judicial independence. With that, I will recognize Ranking Member Heitkamp for her opening remarks.

Testimony of Neomi Rao
Associate Professor
Director, Center for the Study of the Administrative State
George Mason School of Law

Hearing before the United States Senate Committee on
Homeland Security and Government Affairs
Subcommittee on Regulatory Affairs and Federal Management

Examining Agency Use of Deference, Part II
March 17, 2016

Chairman Lankford, Ranking Member Heitkamp, and members of the Committee, thank you for the opportunity to testify on this important issue. My focus today will be on the relationship between judicial deference to agency decisionmaking and the extensive delegation of lawmaking authority from Congress to agencies.

In recent opinions, Chief Justice Roberts and Justices Thomas and Alito have each drawn a connection between delegation and deference.[1] A reconsideration of judicial deference naturally implicates the scope of delegations, in part because deference is one consequence of Congress leaving a significant interpretive space for administrative agencies. Moreover, both judicial deference and the Court's refusal to limit delegations are a kind of judicial restraint that has allowed for the expansion of the administrative state outside the checks and balances of the Constitution.

This short statement borrows from my academic work on delegation and administrative collusion[2] and first explains the connection between permissive

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[1] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("When it applies, *Chevron* is a powerful weapon in an agency's arsenal. Congressional delegations to agencies are often ambiguous—expressing 'a mood rather than a message.'"); Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1219 n. 4 (2015) (Thomas, J., concurring in the judgment) (explaining why courts should not defer to agency interpretations of their own regulations and also suggesting that such deference raises concerns that the executive will be allowed to impose binding obligations on regulated parties that "suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner."); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment) (explaining that the creation of the *Paralyzed Veterans*' doctrine "may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations....At least one of the three factors ... concerns a matter that can be addressed by this Court.").

[2] *See* Neomi Rao, *Administrative Collusion, How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).

delegations and the judicial deference doctrines, highlighting how some of the confusion related to judicial review of agency action stems from the reality of open-ended statutory grants. Second, I consider how deference and the Court's limited non-delegation doctrine share a foundational assumption about separation of powers that Congress and the President compete for control over lawmaking and so Congress will not delegate too much. In this understanding, courts can leave enforcement of the non-delegation principle to the institutional competition between the political branches. Allowing open-ended delegation and then deferring to agency decisionmaking are judicial approaches that assume the political rivalry between Congress and the Executive will adequately protect constitutional limits. Third, I argue that in the modern administrative state, this assumption is mistaken or at least significantly incomplete. Rather than compete over the exercise of administrative power, members of Congress and agencies may often collude to enact specific policies.

The topic of judicial deference has occupied many court decisions and been the subject of extensive academic commentary. Here I address one aspect of this debate and explain why a proper understanding of the delegation dynamic between members of Congress and agencies suggests additional reasons for revisiting judicial deference doctrines. The structural balance has failed to limit delegations. The result has been a significant expansion of executive branch authority and the undermining of Congress as an institution. Deference has allowed the collusion to continue. When the political process and structural checks and balances fail, judicial review provides a necessary remedy to keep the federal government within its constitutional limits.

I DELEGATION AND DEFERENCE

The modern administrative state depends on a significant transfer of the lawmaking function from Congress to the administrative agencies in statutes that leave discretion to agencies to formulate policy. While maintaining the principle that Congress

cannot delegate its lawmaking power,[3] the Supreme Court has allowed capacious delegations of authority to agencies, asking only whether a statute provides an "intelligible principle."[4] In practice, this provides virtually no judicial limit to the scope of discretion Congress may give to an agency.[5]

Confronted with the reality of agencies possessed with authority to make rules with the force of law,[6] the Supreme Court has articulated various doctrines of deference to agency decisionmaking. The Supreme Court first held that it would defer to an agency's interpretation of its own ambiguous regulations,[7] an understanding reaffirmed in *Auer v. Robbins*.[8] Perhaps the most significant of deference case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] articulated a two-step inquiry in which the Court would consider first whether "Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."[10] Second, when a statute is "silent or ambiguous…the question for the court is whether the agency's answer is based on a permissible construction of the statute."[11] The Court has modified the *Chevron* inquiry over the years, adding a *Chevron* step zero,[12] or perhaps collapsing the inquiry into one step.[13] A few terms ago in *City of Arlington v. FCC*,[14] the Court held that *Chevron* deference applied to an agency's interpretation of its own jurisdiction.

While the Court continues to invoke *Chevron*, it nonetheless has carved out some important exceptions to the framework for deference. In particular, in *King v. Burwell*,[15] Chief Justice Roberts declined to apply *Chevron* because the framework

> is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In

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[3] Field v. Clark, 143 U.S. 649, 692 (1892) (explaining that nondelegation is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").
[4] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).
[5] *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1255 (Thomas, J., concurring in the judgment).
[6] *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
[7] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[8] 519 U.S. 452 (1992).
[9] 467 U.S. 837, 842-43 (1984).
[10] *Id.* at 842.
[11] *Id.* at 843.
[12] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).
[13] *See* Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).
[14] 133 S. Ct. 1863 (2013).
[15] 135 S. Ct. 2480, 2488-89 (2015).

> extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. … Whether [tax] credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[16]

This decision builds on an earlier line of cases in which the Supreme Court declined to defer on certain "major questions" unless the agency had explicit authority to decide the matter.[17] Of course it may be difficult to predict when a case is extraordinary or raises a major question of economic and political significance.

A robust and ongoing debate continues both in the courts and in the academic commentary about the scope, meaning, and desirability of judicial deference. In particular the Supreme Court has seriously cast doubt on the continuing viability of *Seminole Rock* and *Auer* deference.[18] Unable to delve into all the ongoing debates here, I think it is fair to say that the actual judicial practice is in flux and academics are reconsidering the meaning and application of judicial deference.[19]

Such confusion stems, at least in part, from the persistent tension between deference and *Marbury*'s command to "say what the law is."[20] Because deference leaves important interpretive decisionmaking with the agency, it can conflict with the Article III judicial power.[21] On the other hand, when statutes leave open significant discretion, courts have determined that the formulation of regulatory policy is better left to the agencies that at least have a measure of political accountability as part of the executive branch. When statutes give authority in capacious and open-ended terms, there is simply

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[16] *Id.* at 2488-89 (internal quotation marks omitted).

[17] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

[18] *See* Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) (arguing for the abandonment of *Auer* deference and "restoring the balance originally struck by the APA").

[19] *See, e.g*, Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015); Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015); Jack M. Beermann, Chevron *at the Roberts Courts: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014).

[20] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[21] *Compare* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000), *with* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

less *law* and more discretion. There has been an understandable reluctance by the judiciary to second-guess the exercise of policymaking discretion by executive agencies.

Nonetheless, judicial review remains an essential check for preserving the constitutional and statutory limits on administrative agencies. The net result of extensive delegations combined with judicial deference is a massive transfer of authority to the executive branch. In a number of Supreme Court decisions justices have sought to make the administrative state more accountable to the President,[22] the Congress,[23] and the courts.[24] Recent opinions by Chief Justice Roberts and Justices Thomas and Alito have emphasized the importance of the judicial role in checking agency interpretation, particularly because congressional delegations often leave significant authority with the Executive Branch.[25]

Deference compounds the problems of delegation, allowing Congress and agencies to set policy outside the checks and balances of the Constitution. So long as agencies must sometimes regulate with little guidance from Congress, the judiciary will have difficulty balancing its proper role in reviewing agency action. Reconsidering the delegation principle and deference together might promote a more coherent reappraisal of the judicial review of agency action.

II DELEGATION AND DEFERENCE: A SHARED AND FLAWED FOUNDATION

The modern administrative state depends on courts practicing a kind of restraint—refusing to scrutinize delegations and deferring to agency decisionmaking. The most common reasons offered for such restraint pertain to the inability to assess when

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[22] *See* Free Enterprise Fund v. PCAOB, 561 U.S. 477, 499 (2010) (holding two layers of removal restrictions were an unconstitutional limitation on the President's power and noting that "[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."). *See also* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (arguing that that President must have the power to remove at will all officers that execute the law, including the heads of the so-called independent agencies).

[23] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1242 (Thomas, J., concurring in the judgment) ("The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power.").

[24] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015).

[25] *See supra* note 1.

delegations have gone too far, a line-drawing problem.[26] Yet the line-drawing problem occurs in many constitutional questions and the judicial duty often requires courts to step in even when they would prefer to stay out of a dispute between the political branches.[27] As Justice Alito recently suggested about judicial review of delegations, "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."[28]

The Court frequently answers difficult constitutional questions, which suggests there might be alternative reasons for restraint in this area, particularly for formalist judges.[29] Let me suggest just one: the formal legal defense of *Chevron* and the flaccid non-delegation doctrine both depend on a view that the political process and the Constitution's structural checks and balances will be sufficient to protect constitutional limits.[30] The judicial retreat depends, at least in part, on a key assumption that Congress gives up power when it delegates and then no longer controls what occurs in administration.

The Supreme Court has generally refrained from active enforcement of the non-delegation doctrine because it views Congress as abdicating power to the Executive when it delegates.[31] Judicial intervention is unnecessary because delegations minimize congressional power and transfer power to the Executive. Thus, the reasoning goes, separation of powers and the competition between the two political branches should limit excessive delegation of legislative power. As Justice Scalia explained:

> Congress could delegate lawmaking authority only at the expense of increasing the power of either the President or the courts. Most often, as a practical matter, it would be the President. ...Thus, the need for delegation would have to be

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[26] *See* Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 474-75 (2001) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" (internal quotation marks omitted)).

[27] *See* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (declining to apply the political question doctrine and noting that "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid'").

[28] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (Alito, J., concurring).

[29] This testimony does not address the various functional and practical reasons offered for deference doctrines, as I am concerned with the legal and constitutional grounds for judicial review.

[30] *See* Rao, *supra* note 2.

[31] *See, e.g.*, Loving v. United States, 517 U.S. 748, 758 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch.").

> important enough to induce Congress to aggrandize its primary competitor for political power.[32]

The Court has concluded that delegations will be self-policing and has assumed, to use the language of James Madison, that Congress possesses both the "personal motives" and constitutional means to limit excessive delegations with new legislation.[33] This structural competition should be sufficient to enforce the non-delegation principle. Scholars writing from different perspectives have similarly supported judicial non-enforcement of the delegation principle on precisely these grounds—that political rivalry will adequately constrain delegations.[34]

Somewhat less apparent, the deference framework relies on similar assumptions about congressional behavior and separation of powers. *Chevron* reinforces the idea that ambiguities and silences in a statute should be left to reasonable agency interpretation—this serves as "the quintessential prodelegation canon."[35] *Chevron* holds Congress to its choice to delegate authority to an agency. From a formal perspective, deference makes Congress bear the cost of delegation—when Congress fails to resolve an issue, the policymaking choices go to the executive, Congress's political rival. As Justice Scalia explained:

> Congress cannot enlarge its own power through *Chevron*—whatever it leaves vague in the statute will be worked out by someone else. *Chevron* represents a presumption about who, as between the executive and the judiciary, that someone else will be. (The executive, by the way—the competing political branch—is the less congenial repository of the power as far as Congress is concerned.) So Congress's incentive is to speak as clearly as possible on the matters it regards as important.[36]

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[32] Mistretta v. United States, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting).
[33] THE FEDERALIST NO. 51 (James Madison).
[34] *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004) ("[I]t is implausible that Congress—the historical rival of the Executive—would give away all or even most of its powers. … [S]trict nondelegation is unnecessary to achieve lively checks and balances among the branches of government."); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 222 (arguing that the assumption of congressional aggrandizement is inconsistent with the decision 'to delegate broadly to agencies in the first instance, to lodge most of this power with executive rather than with independent agencies, and to accede to ever greater assertions of presidential control over the entire sphere of administrative activity.").
[35] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000). *See also* Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 511-26 (1989) (criticizing *Chevron* on nondelegation grounds).
[36] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013).

As in the non-delegation context, Justice Scalia assumed that Congress actively competes with the executive and therefore *Chevron* deference should create an incentive for Congress to legislate with more specificity.

Thus, one of the most ardent defenders of *Chevron* as a stable background rule for judicial review[37] thought that deference might encourage Congress not to yield its lawmaking powers. By favoring executive branch lawmaking over judicial lawmaking, the Court could maintain separation of powers by leaving corrections of excessive delegations to the political, not judicial, process. Institutional rivalry would spur Congress not to delegate too much.

Both the deference doctrines and the non-enforcement of the delegation principle depend on the assumption that structural political rivalry will keep Congress and the Executive within their constitutional powers, in particular because Congress will guard its lawmaking power from the Executive. These assumptions, however, rely on an incomplete understanding of how members of Congress can benefit from delegation, as discussed in the next Part. A more realistic understanding of how power operates in administration suggests further reasons for a more robust role for courts in reviewing agency authority and agency decisionmaking.

III ADMINISTRATIVE COLLUSION

The conventional view of delegations and deference suggest that judicial review should occur rarely in part because the competitive separation of powers dynamic will be sufficient to protect constitutional values and individual liberty. Yet the modern administrative state has unraveled this assumption. Delegation has a more complex incentive structure than the conventional view assumes. If structural checks and balances

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[37] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (explaining that "*Chevron* thus provides a stable background rule against which Congress can legislate: ...Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion"). Yet there are some indications that Justice Scalia was rethinking judicial deference doctrines. *See, e.g.*, Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) (arguing for a reconsideration of *Seminole Rock/Auer* deference and noting that the Supreme Court's "elaborate law of deference to agencies' interpretations of statutes and regulations" was "[h]eedless of the original design of the APA" and that the problem of deference to agency interpretations was "bad enough, and perhaps insoluble if *Chevron* is not to be uprooted").

cannot keep the political branches within constitutional limits, this provides a reason to reconsider the scope of judicial review of agency authority and action.

The conventional view correctly states that delegation weakens Congress as an institution. Nonetheless, delegation can benefit individual members of Congress. These benefits include reducing the costs of legislating[38] and allowing members to avoid responsibility for difficult choices by pushing them off to the agency.[39] In addition, delegation can provide a source of influence outside the legislative process. When authority is delegated to an agency, members have an opportunity to intervene in the regulatory process to satisfy special interests, serve constituents, or pursue particular political goals.[40] Leaving statutory requirements vague can allow members to work out the details, or seek particular exemptions and modifications, in the regulatory process rather than the legislative process. Delegation helps legislators to satisfy a variety of interests.[41]

As John Hart Ely noted, "it is simply easier, and it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process."[42] Especially in an era of entrenched party polarization, legislators may prefer to take a smaller part of administration because they cannot accomplish their goals through the legislative process.[43] The possibility of this type of "particularized

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[38] *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267 (1967) (explaining that legislatures face higher transaction costs than agencies and therefore legislatures will delegate to agencies particularly when a proposed rule is controversial).

[39] *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 92-93 (1993) (arguing that "delegation enhances legislators' opportunities simultaneously to support the benefits of an action and oppose its costs, which is political heaven").

[40] *See* Rao, *supra* note 2, at 1481-84 (detailing the opportunities of individual members to benefit from delegated authority).

[41] *See* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 51 (1982) (noting that agencies with delegated discretion "can beneficially or adversely affect the fortunes of each legislator's constituents, and they can grant particularized favors to constituents through the congressman's good offices. ... Thus, agencies reinforce the legislative tendency toward the public production of private goods, or the collective satisfaction of high demanders' preferences for public goods.").

[42] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980) (explaining why legislators often delegate authority to executive agencies).

[43] *See* Rao, *supra* note 2, at 1484-88 (explaining how party polarization increases the tendency to delegate); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 129-35 (1999) (data showing that Congress delegates more discretion to the executive under unified government).

control"[44] for legislators further reduces the competitive tension between Congress and the Executive over how much of the legislative function is delegated.

The ability of lawmakers to influence administration poses a number of constitutional problems. First, allowing individual members to influence administration is inconsistent with the "collective Congress."[45] Quite simply, Article I vests all federal legislative power in Congress.[46] Collective decisionmaking serves as the cornerstone of representative government—it provides the mechanism by which representatives serving different interests come together and enact laws for the general good. As James Madison explained, "In the extended republic of the United States, and among the great variety of interests, parties and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice and the general good."[47] Lawmaking could not be trusted to a single person or even to a small group of representatives, but instead was given to a sufficiently large bicameral Congress. Legislators must represent their constituents, but can serve their particular interests only by enacting laws, which requires negotiating with other lawmakers.[48] When members have a way to exercise power individually, their interests are no longer directly aligned with the institution of Congress or the public as a whole.

Second, the Constitution gives no lawmaking power to individual members of Congress and specifically restricts them from participating in the execution of the laws. The Incompatibility Clause prohibits a person from simultaneously serving in Congress and as an executive officer.[49] Moreover, the Appointments Clause does not give

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[44] Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 10 (1994).
[45] *See* Rao, *supra* note 2, at 1492-93 (introducing the idea of the "collective Congress" as a fundamental principle of separation of powers).
[46] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States....").
[47] The Federalist No. 51 (James Madison).
[48] *See, e.g.*, H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1033 (1975) (explaining that the framers' envisioned that "representational interests would be expressed only through the institutional filter of bicameralism and by placing limitations on the powers of individual legislators").
[49] U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

Congress the power to appoint officers[50] and the Supreme Court has prohibited congressional attempts to control or to supervise executive officers through the removal power.[51] Yet through the creation of administrative discretion, members can influence execution and administration outside of the ordinary legislative channels. Delegation to the executive simultaneously can serve as a kind of self-delegation to committees, subcommittees, and members of Congress, contrary to the principles articulated in *INS v. Chadha*.[52]

Finally, delegation allows for a kind of administrative collusion between the political branches.[53] As an institution, Congress cannot control administration except through the enactment of legislation. Yet members can pursue their individual interests through the regulatory process. Senators and Representatives thus will sometimes share the interest in expanding the discretion of executive agencies, because this creates an opportunity for them to act as "solo practitioners,"[54] representing their particular interests.

Collusion between the political branches, rather than competition, undermines individual liberty. It allows administrators to function as lawmakers and lawmakers to influence administrators. This dynamic turns separation of powers on its head and violates the venerable principle "that the power to write a law and the power to interpret it cannot rest in the same hands."[55]

Delegation thus raises serious constitutional problems that often will not be checked by structural competition between the branches. Similarly, judicial deference can undermine separation of powers by removing the judicial check and allowing both

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[50] U.S. CONST. art. II, § 2, cl. 2 (vesting the President with appointment power over principal officers and allowing Congress to vest the appointment of inferior officers "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

[51] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charge with the execution of the laws it enacts.").

[52] 462 U.S. 919 (1983) (holding the one-house legislative veto unconstitutional and requiring that all legislative actions follow the requirements of bicameralism and presentment). Admittedly, legislator influence over administration is not a formal mechanism like the one-house veto, but similar concerns arise when individual lawmakers can act outside of bicameralism and presentment to influence particular administrative matters.

[53] *See* Rao, *supra* note 2, at 1504.

[54] *See* Christopher DeMuth, *The Decline and Fall of Congress*, WALL STREET JOURNAL, Oct. 18, 2015 (discussing congressmen as "solo practitioners" and noting that "[s]ingle-member activism has replaced the committee hierarchies and autocratic chairmen of times past").

[55] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013).

agencies and members of Congress to expand their powers. A background rule of deference may promote ambiguous lawmaking and increase the level of discretion given to agencies. This shifts lawmaking away from Congress, but allows legislators to shape discretion in the regulatory process. Instead of prompting Congress to jealously guard its lawmaking power from the Executive, deference can encourage Congress to delegate and shape administration outside of the scrutiny of the courts. Since Congress often does not compete in the way the conventional view assumes, deference can merely ratify collusion between the political branches. The fact that the structural checks and balances have not limited delegations suggests one reason for less deferential judicial review.

IV LESS DELEGATION, LESS DEFERENCE

Judicial restraint in enforcing the non-delegation principle and judicial deference to agency interpretations depend in part on an assumption that the structural checks and balances will keep the political branches within their constitutional powers. Yet delegation in the modern administrative state has unraveled structural competition as explained above. This has led to an expansion of executive power and the increase of lawmaking outside of constitutional procedures. Here I offer a few, necessarily brief, observations for reconsidering judicial review in the administrative state.

At the outset, it is worth noting that the courts cannot remedy the problems of administrative overreach on their own. Judicial review plays an essential part in keeping the branches within their constitutional limits. Yet judicial review is not the exclusive mechanism for this, and often it will not be the most effective check. The political branches have far more effective means to check each other. Through more specific legislation, appropriations, and oversight, Congress possesses powerful mechanisms to counteract the expansion of executive power.

Recognizing this responsibility, a group of Senators and Representatives are seeking to revive the first branch of government. As members of the Article I Project launched by Senator Mike Lee have explained: "The stability and moral legitimacy of America's governing institutions depend on a representative, transparent, and accountable Congress to make federal law. Today, Congress willfully shirks this

responsibility, and permits – and indeed, often encourages – the Executive Branch to do work the Constitution assigns to the legislature. Congress's refusal to use its powers – to do its duty – is the root cause of Washington's dysfunction."[56]

Congress should take greater responsibility for legislating, and the courts must also play their part. The awareness of how delegation works to fracture the collective Congress can be part of the reconsideration of the deference framework in several areas. First, *Chevron* step zero looks at whether Congress intended to delegate to an agency the authority to act with the force of law.[57] Congress may intend to give power to an agency—but Congress cannot delegate its exclusive lawmaking power. It hardly serves as a defense to a challenged statute or regulation that Congress *intended* to make an overbroad delegation to an agency. Instead, the potential for members of Congress and the executive to expand power from such delegations provides additional support for independent review of the scope of an agency's delegated authority and the particular exercise of that authority.

The likelihood of congressional influence suggests a reason for reconsidering *City of Arlington v. FCC*, in which the Supreme Court held that courts must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction.[58] For the reasons given by Chief Justice Roberts in dissent, the Court should make an independent judgment about whether Congress has delegated authority to the agency over a particular issue.[59] One additional argument would be that when an agency pushes at the boundaries of its jurisdiction, it might be working with key legislators, who either desire expansion of the agency's jurisdiction or are willing to tolerate it. Allowing agencies to interpret the scope of their jurisdiction may allow some members of Congress to undermine the statutory limits on an agency's authority.[60]

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[56] Article 1 Project, *Policy Brief: The Case for Congressional Empowerment* (Feb. 3, 2016) available at http://www.scribd.com/doc/297785392/A1P-Issue-No-1-The-Case-for-Congressional-Empowerment.
[57] *See supra* notes 6 & 12.
[58] 133 S. Ct. 1863 (2013).
[59] *See id.* at 1886 (Roberts, C.J., dissenting) (explaining that the Court must ensure "that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.").
[60] *See* Rao, *supra* note 2, at 1518.

Second, last Term the Supreme Court strongly signaled it might overrule *Seminole Rock/Auer*, which provides for deference to an agency's interpretation of its own rules. Justices Scalia and Thomas explicitly called for overruling these cases, emphasizing the principle that lawmaking and law interpretation cannot subsist in the same hands.[61] While this combination of law making and law interpretation is especially apparent in executive agencies; the rationale could also extend to the deference given to agency interpretations of their statutory mandates. If the Court should not defer to an agency's interpretation of its own rules, perhaps it should also reconsider deferring to agency interpretations that might be strongly influenced by Congress. Which is to say that Congress should not make the laws and then interpret them in the administrative process. When Congress delegates in open-ended terms, the likelihood of congressional interference increases because there is more discretion for the agency to exercise. Keeping agencies to their statutory grants of authority would limit the ability of members of Congress to interpret the law through the back door in a way that lacks the accountability, visibility, and collective action of legislation.

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As the Supreme Court has said:

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.[62]

The administrative state has required the loosening and sometimes the abandonment of constitutional restraints. Yet the second-best doctrines of administrative law have not served to protect individual liberty. All three branches can work to restore the particular accountability created by the Constitution through more effective presidential oversight

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[61] *See* Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1212-13 (2015) (Scalia, J., concurring in the judgment); *id.* at 2225 (Thomas, J., concurring in the judgment).
[62] INS v. Chadha, 462 U.S. 919, 959 (1983).

and control of administration; greater congressional specificity in lawmaking; and independent judicial review of the actions of the political branches to ensure they stay within constitutional limits.

Testimony of Charles J. Cooper
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The Administrative State and Congressional Abrogation of the *Chevron* and *Seminole Rock* Doctrines

Hearing Before the
Homeland Security & Governmental Affairs Committee,
Subcommittee on Regulatory Affairs & Federal Management
United States Senate

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Washington, DC

Chairman Lankford, Ranking Member Heitkamp, and members of the Committee: thank you for providing me this opportunity to discuss the sweeping and largely unaccountable governmental powers exercised by administrative agencies.[1] As Chief Justice Roberts has lamented, "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[2] The modern Administrative State has become a sovereign unto itself, a one-branch government whose regulatory grasp reaches into virtually every human activity.

The focus of my remarks will be on the Supreme Court's policy of deferring to agency interpretations of ambiguous statutes, known as the *Chevron* doctrine, as well as its companion policy of deferring to agency interpretations of ambiguous regulations, known as the *Seminole Rock* doctrine. In my view, these doctrines are of doubtful validity under the Constitution's separation of powers, and they exacerbate other constitutional concerns created by the rise of the modern Administrative State. My purpose today is to outline these serious problems with *Chevron* and *Seminole Rock* and to offer a few preliminary thoughts on what Congress can do to abrogate these two doctrines.

I. The Rise of the Administrative State

As Justice Thomas observed in his concurring opinion in *Perez v. Mortgage Bankers Association* last year, the modern Administrative State "has its root[s] in . . . the Progressive Era."[3] And the seeds from which those roots sprang were planted primarily by Woodrow Wilson,

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[1] Founding partner, Cooper & Kirk, PLLC. Mr. Cooper served as the Assistant Attorney General for the Office of Legal Counsel from 1985–1988 and in the Civil Rights Division of the Justice Department from 1981–1985. Much of his practice focuses on cases involving the separation of powers and the Administrative Procedure Act. As part of that practice, Mr. Cooper has litigated numerous important cases in the Supreme Court and in the lower federal courts.

[2] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

[3] 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring in the judgment).

the Publius of the Administrative State. In his 1887 essay, "The Study of Administration,"[4] Wilson argued for broad delegations of regulatory authority to "expert" administrative agencies. Wilson believed that the economic and social transformations of the late-nineteenth century required a national government that could act with "the utmost possible efficiency."[5] But he lamented that our constitutional structure, with its carefully crafted system of separated powers and checks and balances, was not designed to be efficient;[6] to the contrary, it was designed to safeguard the People's liberty by making the exercise of Federal governmental power difficult.[7] Wilson complained that, under our system, "advance must be made through compromise, by a compounding of differences, by a trimming of plans and a suppression of too straightforward principles."[8] These inefficiencies were, to Wilson's mind, made even worse by the need to justify governmental reforms to the People, whom he regarded as "selfish, ignorant, timid, stubborn, or foolish."[9]

Wilson preferred to place governmental powers in the hands of those who could claim to have expertise relating to the policy issues under consideration. It was crucial to "discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials," providing them with "large powers and unhampered discretion."[10] In Wilson's analogy, "[t]he cook[s] must be trusted with a large discretion as to the management of the fires and the

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[4] Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198 (1887).
[5] *Id.* at 197.
[6] *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").
[7] *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2597 (2014) (Scalia, J., concurring in the judgment) (describing "the folly of interpreting constitutional provisions designed to establish a structure of government that would protect liberty on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible" (quotation marks and citation omitted)).
[8] Wilson, *supra* note 4, at 207.
[9] *Id.* at 208.
[10] *Id.* at 213.

ovens."[11] By conferring sweeping powers on the "experts," Wilson hoped to overcome the inefficiencies of our constitutional system—that is, its checks and balances—and permit agencies to make policy swiftly, insulated from the political pressures faced by the People's elected representatives.

This vision of expansive bureaucratic power took hold in the Supreme Court's jurisprudence in the early twentieth century, particularly during the New Deal. As Wilson made clear, the key to the Progressives' vision of the Administrative State was the concentration of broad authority in agencies, and that meant that its greatest obstacle was the Constitution's careful separation of power through exclusive, non-delegable grants to separate branches of government.

"[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government."[12] Article I vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States";[13] Article II vests "[t]he executive Power . . . in a President of the United States";[14] and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court," and in congressionally established inferior courts.[15] "The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty."[16]

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[11] *Id.* at 214.
[12] *Department of Transp. v. Association of American R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment).
[13] U.S. CONST. art. I, § 1.
[14] *Id.* art. II, § 1.
[15] *Id.* art. III, § 1.
[16] *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks omitted); *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) ("'[I]f there is a principle in our Constitution . . . more sacred than another,' James Madison said on the floor of the First Congress, 'it is that which separates the Legislative, Executive, and Judicial powers.' . . . By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability." (first omission in original) (citation omitted)); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("Separation-of-powers principles are intended, in part, to protect each

The Supreme Court has recognized that "[t]hese grants are exclusive";[17] no branch can delegate its power to another branch. The constitutional text confirms this,[18] for its careful division of legislative, executive, and judicial powers would be senseless if those powers could be reallocated by the branches themselves.[19] Nor could the branches perform their task of checking and balancing each other if they delegated away their unique roles in the constitutional structure. As Madison said in *Federalist No. 51*: "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist

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branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment) ("the Constitution diffuses power the better to secure liberty").

[17] *Association of American R.R.*, 135 S. Ct. at 1240–41 (Thomas, J., concurring in the judgment). *See Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) ("Under the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the 'judicial Power of the United States' . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." (alterations in original) (quotation marks omitted)); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010) ("[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." (quotation marks omitted)); *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) ("Article I, § 1 . . . permits no delegation of those powers . . . .").

[18] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–53 (2002). Notably, the Founders knew how to authorize delegations where they thought it necessary. Article II, Section 2, Clause 2 vests the power to appoint Executive officers in the President with the advice and consent of the Senate, but it also provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." This makes the absence of a broader authority to delegate all the more illuminating.

[19] *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow."); *see also Free Enter. Fund.*, 561 U.S. at 497 ("But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." (citation omitted) (quotation marks omitted)); *Wellness Int'l Network*, 135 S. Ct. at 1960 (Roberts, C.J., dissenting) ("In a Federal Government of limited powers, one branch's loss is another branch's gain, so whether a branch aims to 'arrogate power to itself' or to 'impair another in the performance of its constitutional duties,' the Constitution forbids the transgression all the same." (citation omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

encroachments of the others . . . ."[20] The Founders, accordingly, armed each branch with a variety of checking powers so that they could prevent encroachments and abuses by the other two. For these reasons, the Court once believed that the doctrine forbidding the delegation of Congress' legislative power to the Executive Branch "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[21]

Despite the nondelegation doctrine's firm foundation in the structure of the Constitution and in Supreme Court precedent, the Court "has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power."[22] The last time the Court invalidated statutes delegating legislative power to the Executive Branch[23] was in 1935. During the 80 years since then, numerous agencies have essentially been granted regulatory *carte blanche*—authorized to regulate, for example, "in the public interest"—and the Supreme Court has uniformly upheld such boundless delegations of legislative authority.[24] As a practical matter, the nondelegation doctrine was laid to rest in *Whitman v. American Trucking Associations*. In upholding the Clean Air Act's delegation to the EPA of power to set ambient air quality standards "requisite to protect the public health,"[25] the Court acknowledged that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[26]

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[20] THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).
[21] *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).
[22] *Association of American R.R.*, 135 S. Ct. at 1250 (Thomas, J., concurring in the judgment).
[23] *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).
[24] *American Trucking Ass'ns*, 531 U.S. at 474 (collecting cases).
[25] *Id.* at 472.
[26] *Id.* at 474–75.

The Court has also permitted the judicial power, although vested by Article III exclusively in the federal courts, to be delegated to the Administrative State. The leading case is *Crowell v. Benson*, which upheld a Federal workers' compensation statute that made agency findings of fact final and binding upon Article III courts.[27] The Court held that this agency exercise of judicial power is constitutionally permissible so long as an Article III reviewing court is able to decide all questions of law *de novo*.[28] Since *Crowell*, it has been an unquestioned principle of the Supreme Court's jurisprudence that administrative agencies can adjudicate private rights and issue findings of fact that bind even Article III courts.[29]

The inevitable result of these decisions was to unite all three governmental powers in the "expert" hands of the Administrative State, despite Madison's famous warning in *Federalist No. 47* that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[30] As the Supreme Court has recognized, "Under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority."[31] But the Wilsonian vision of the modern Administrative State could not be fully realized unless the "experts" in the agencies were also liberated from the control of the President. In *Humphrey's Executor v. United States*, the Court held that Congress may restrict the President's removal of executive branch officers who are empowered to exercise, in the words of the Court, "quasi legislative and quasi judicial" power.[32] Because the power to remove an officer is essential to the ability to control the officer,[33] the

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[27] 285 U.S. 22, 46 (1932).
[28] *Id.* at 54.
[29] *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 853–57 (1986) (holding that an agency could adjudicate a private, state-law counterclaim).
[30] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).
[31] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991).
[32] 295 U.S. 602, 629 (1935).
[33] *Morrison v. Olson*, 487 U.S. 654, 726 (1988).

effect of *Humphrey's Executor* was to free many of the Federal Government's most powerful agencies from direct presidential control.

The short of it is this: the Administrative State is now a *de facto* one-branch government, and most of the "experts" who run it are politically accountable to no one. They are not elected, nor are they controlled by those who are.

II. *Chevron*, *Seminole Rock*, and Their Justifications

As it gradually dismantled the separation of powers, the Court reasoned that the Constitution's structural safeguards of liberty were unnecessary—the Court could be trusted to safeguard liberty. The Administrative State could be permitted to wield legislative power because the Court would insist that administrative rules comport with "intelligible principle[s]" set forth by Congress in the agencies' legislative mandates.[34] The Administrative State could be permitted to exercise judicial power because the courts would review any administrative conclusions of law.[35] And the Administrative State could be permitted to exercise executive power, independent of Presidential control, whenever the courts determined that independence from Presidential oversight would be beneficial.[36] What emerged from this period was an implicit bargain: the Court would permit the Administrative State to exercise legislative, executive, and judicial power, but it would review administrative exercises of such power to prevent lawlessness and abuse. Judicial review, then, was substituted for the Constitution's checks and balances as the safeguard against the Administrative State becoming despotic.

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[34] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).
[35] *Humphrey's Executor*, 295 U.S. at 631–32.
[36] *Morrison*, 487 U.S. at 689–93; *id.* at 693 ("We do not think that this limitation as it presently stands *sufficiently deprives* the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." (emphasis added)).

The deal was a bad one on its own terms, but it got worse—much worse—when the Justices reneged on it in *Chevron v. NRDC*[37] and *Bowles v. Seminole Rock & Sand Co.*,[38] which freed the Administrative State from meaningful judicial review. Both doctrines require courts to defer to reasonable agency interpretations of ambiguous laws. In the case of *Chevron*, courts defer to reasonable agency interpretations of *statutes*; in the case of *Seminole Rock*, they defer to reasonable agency interpretations of the agency's own *regulations*. The justifications for the two doctrines are largely similar, and none of them is persuasive.

Chevron created a now-familiar two-step framework for federal courts to evaluate agency regulations and other decisions interpreting federal statutes. First, if the language of the statute is unambiguous, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[39] But if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation will be upheld if it is "based on a permissible construction of the statute," even if it is not the construction that the court, using "traditional tools of statutory construction," would adopt.[40] Under *Chevron*, then, ambiguity in the text of a law is the source of the agency's interpretive authority—its jurisdiction—to resolve the ambiguity. And because statutory ambiguity is ubiquitous in the United States Code, *Chevron* grants administrative agencies interpretive discretion over virtually the entire sweep of federal statutory law.

Almost forty years before *Chevron*, *Seminole Rock* stated, with little explanation, that an agency interpretation of its own regulation must be given "controlling weight" by a court "unless

[37] 467 U.S. 837 (1984).
[38] 325 U.S. 410 (1945).
[39] 467 U.S. at 842–43 (footnote omitted).
[40] *Id.* at 843 & n.9.

it is plainly erroneous or inconsistent with the regulation."[41] Although the Court invoked the doctrine set forth in *Seminole Rock* several times over the next five decades, it was given new prominence by the 1997 decision in *Auer v. Robbins*[42]—so much so that the doctrine is now frequently referred to as *Auer* deference. Although the precise *Seminole Rock* formulation differs from the *Chevron* two-step approach, "[i]n practice, [*Seminole Rock*] deference is *Chevron* deference applied to regulations rather than statutes. The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading—within the scope of the ambiguity that the regulation contains."[43]

Once the notion of judicial deference to agency interpretations took hold, the Court extended it to the full reach of its logic. For example, the Court held, in the *Brand X* case, that an agency's interpretation of an ambiguous statute prevails over a federal court's prior contrary interpretation.[44] And in *City of Arlington v. FCC*, the Court extended *Chevron* to questions of agency *jurisdiction*, holding that, when a statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency's determination that it has such authority.[45] A similar, "steady march toward deference" can be seen in the context of *Seminole Rock* deference.[46] The bottom line is that *Chevron* and *Seminole Rock* have transformed the Administrative State into a kind of Super Court, vested with the last word, *binding even on the Supreme Court*, on the meaning of ambiguous statutes and regulations.

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[41] 325 U.S. at 414.
[42] 519 U.S. 452, 461 (1997).
[43] *Decker v. Northwest Envt'l. Def. Ctr.*, 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part) (citations omitted).
[44] *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).
[45] 133 S. Ct. at 1868–71.
[46] *Perez*, 135 S. Ct. at 1214 (Thomas, J., concurring in the judgment) (collecting cases).

As Justice Scalia once observed, *Chevron* and *Seminole Rock* are "judge-made doctrines of deference."[47] They "did not purport to be based on statutory interpretation" of the Administrative Procedure Act.[48] Indeed they cannot be reconciled with the plain text and original design of that statute, as explained more fully below. Nor are these doctrines required by the Constitution.[49] To the contrary, as discussed below, the constitutionality of judicial deference to agency statutory and regulatory interpretations is highly doubtful.

The rationales for these judge-made rules of deference have proven elusive. *Chevron*'s most prominent justification is that Congress, by enacting an ambiguous provision, implicitly signals an intent to delegate power to resolve the ambiguity to the agency. A similar justification has been offered for *Seminole Rock*.[50] But the Court has been schizophrenic about the *kind of power*—legislative or judicial—that Congress has supposedly delegated to the agency. *Chevron* itself offers both answers. The rule of deference is at times framed in terms of judicial power: the Court speaks of "an agency's construction of the statute which it administers,"[51] and the agency is described as offering an "interpretation" of an ambiguous statute's "meaning."[52] Yet elsewhere

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[47] *Id.* at 1211 (Scalia, J., concurring in the judgment).
[48] Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 785 (2010) (describing *Chevron* in these terms).
[49] *See* Daniel Lovejoy, *The Ambiguous Basis for* Chevron *Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 898 ("[a] constitutional explanation of *Chevron* proves far too much"); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129–31 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–16. Some scholars have argued, implausibly, that *Chevron* might be required by principles of judicial restraint and separation of powers, *see, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78, 283, 285 (1988); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 308–09, 312 (1986). It is worth noting that, if *Chevron* were constitutionally mandated, the Supreme Court's decision in *United States v. Mead Corp.* would have to be overruled, since it held that *Chevron* does not apply where Congress has not delegated to the agency the authority to resolve statutory ambiguities with the force of law. 533 U.S. 218, 229–31 (2001). In other words, *Mead* recognized that Congress can decide whether *Chevron* applies to a particular statute, which Congress could not do if *Chevron* were constitutionally required. *See infra* Section V.
[50] *See Martin*, 499 U.S. at 151; *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).
[51] *Chevron*, 467 U.S. at 842.
[52] *Id.* at 844–45.

the Court states that the rule of deference is based on a "legislative delegation" that "involve[s] reconciling conflicting policies" and adopting "wise policy"[53]—quintessential exercises of legislative power.

The same confusion is seen in the *Seminole Rock* caselaw. In *Martin v. Occupational Safety and Health Review Commission*, for instance, the Supreme Court reasoned that Congress had delegated to the agency "the power authoritatively to interpret its own regulations" (a judicial power) as "a component of the agency's delegated *lawmaking* powers" (a legislative power).[54]

This conflation of "legislative" and "interpretive" power has persisted in *Chevron* and *Seminole Rock* precedents alike. Most recently, for example, in *City of Arlington v. FCC*, the Court described "archetypal *Chevron* questions" as involving agency "*interpretive decisions* . . . about how best to *construe* an ambiguous term in light of competing *policy interests*."[55] The Court here seems to be describing the offspring of an illicit affair between the legislative and judicial branches—an agency whose job description is to reconcile competing policy interests (a legislative act) through binding interpretations of ambiguous statutory terms (a judicial act). Similarly, in the context of *Seminole Rock* deference, the Court has proffered the oxymoronic explanation that agencies exercise " 'interpretive' lawmaking power."[56]

The dissent in *City of Arlington* likewise blurred the constitutionally critical line between lawmaking and binding interpretation. Chief Justice Roberts described *Chevron* as requiring courts to "defer to an agency's *interpretation of law* when and because Congress has conferred

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[53] *Id.* at 865.
[54] 499 U.S. at 151 (emphasis added).
[55] 133 S. Ct. at 1868 (emphases added).
[56] *Martin*, 499 U.S. at 151; *see also id.* at 154 (describing "lawmaking by regulatory interpretation" and the use of "*adjudicatory* power to play a *policymaking* role" (emphases added)).

on the agency interpretive authority over the question at issue."[57] But elsewhere the Chief Justice said, "[B]efore a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency *lawmaking power* over the ambiguity at issue."[58] Finally, the Chief Justice melded into a single sentence delegations of both judicial and legislative powers: "An agency's *interpretive authority*, entitling the agency to judicial deference, acquires its legitimacy from a delegation of *lawmaking power* from Congress to the Executive."[59]

The delegation rationale for *Chevron* and *Seminole Rock*, then, is completely indifferent to whether the agency action at issue is *making* law or *interpreting* law—or both. Either way, however, *Chevron* and *Seminole Rock* raise serious constitutional questions, for it was precisely to keep these fundamentally different government powers *separate*, and also to separate them from the executive power, that the Framers vested them in *separate* branches. And the constitutional problem is not ameliorated by describing the powers delegated to the Administrative State as "*quasi*-legislative" or "*quasi*-judicial."

In keeping with the Wilsonian emphasis on the rule of experts, the Court has also stated that "practical agency expertise is one of the principal justifications behind *Chevron* deference,"[60] and agency expertise is "[p]robably the most oft-recited justification for *Seminole Rock*."[61] The Court explained the expertise rationale in *Chevron*:

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[57] 133 S. Ct. at 1877 (Roberts, C.J., dissenting) (emphasis added).
[58] *Id.* at 1880 (emphasis added).
[59] *Id.* at 1886 (emphases added).
[60] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990).
[61] *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment); *see also Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part). *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("This broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." (quotation marks omitted));

> Judges are not experts in the field, and are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.[62]

Relatedly, by requiring deference to agency expertise, it follows that *Chevron* and *Seminole Rock* require courts to accept changes in agency interpretations reflecting new facts or changes in administration policy. It is true, of course, that allowing agencies to continuously revise their interpretations of statutes or regulations avoids the "ossification of large portions of our . . . law" that would occur if courts provided definitive interpretations of statutes and regulations.[63] But a fundamental precept of the rule of law is (or at least once was) that the meaning of a statute enacted by Congress does not change unless *Congress* changes it. Nor does the meaning of a duly promulgated regulation change absent formal amendment. In all events, this rationale makes no pretense of providing a statutory or constitutional justification for *Chevron* and *Seminole Rock*, and it does not answer the serious constitutional objections to the validity of the doctrines.[64]

Another justification for *Chevron* and *Seminole Rock* rests on the idea of political accountability. As the Court put it in *Chevron*,

> [w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[65]

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629–30 (1996).

[62] 467 U.S. at 865.

[63] *Mead*, 533 U.S. at 247–48 (Scalia, J., dissenting); *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) ("Agencies with the responsibility and expertise necessary to administer ongoing regulatory schemes should have the latitude and discretion to implement their interpretation of provisions reenacted in a new statutory framework.").

[64] *See infra* Section III.

[65] *Chevron*, 467 U.S. at 865–66. The Court has applied this rationale to the *Seminole Rock* context as well. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991); Manning, *supra* note 61, at 629.

The political accountability rationale has several problems. First, it fails to grapple with the constitutional objections to *Chevron* and *Seminole Rock* discussed below.[66] In fact, this rationale is in the teeth of the Framer's purpose in vesting "all the legislative power" exclusively in Congress: to make the People's locally elected representatives in Congress politically accountable for any policy choices that would govern them *as law*. Second, the notion that agencies are overseen and controlled by a democratically elected President is highly dubious in the case of many agencies and clearly wrong in the case of independent agencies. As noted earlier, the Court in *Humphrey's Executor* largely freed independent agencies from presidential oversight, and "with hundreds of federal agencies poking into every nook and cranny of daily life, th[e] citizen might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching."[67] Third, recent experience—especially after *Chevron*—has shown that the evil of unelected bureaucrats abusing their interpretive power is even worse than unelected judges abusing theirs.

One additional justification has been offered for *Seminole Rock* deference: that "the agency, as the drafter of the rule, will have some special insight into its intent when enacting it."[68] Indeed, based on this rationale, the Court has even gone so far as to suggest that *Seminole Rock* deference is "even more clearly in order" than *Chevron* deference.[69] This argument was

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[66] *See infra* Section III.
[67] *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting).
[68] *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment); *Martin*, 499 U.S. at 152 ("Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question."); Manning, *supra* note 61, at 630.
[69] *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) ("An agency's construction of its own regulations has been regarded as especially due that respect.").

answered by Justice Scalia: "Whether governing rules are made by the national legislature or an administrative agency, we are bound *by what they say*, not by the unexpressed intention of those who made them."[70] And all should agree with this proposition when the unexpressed intentions in question are not those of the legislators or regulators who actually adopted the law in question, but are only the *post hoc* views of subsequent legislators or regulators. Thus, "[f]or the same reasons that we should not accord controlling weight to postenactment expressions of intent by individual Members of Congress, we should not accord controlling weight to expressions of intent by administrators of agencies."[71]

In sum, *Chevron* and *Seminole Rock* do not purport to establish a rule required by the Constitution or by statute. They are judge-made legal fictions.[72] But the central problem with *Chevron* and *Seminole Rock* is not just that they have no basis in written law; the problem is that they are at war with the basic structural principles of our Constitution.

III. Judicial Deference and the Constitution

A. Article III. To the extent that *Chevron* and *Seminole Rock* rest on an implicit delegation of *judicial* power to administrative agencies, they are at war with Article III. It is indisputable that Congress does not have the power "to issue a *judicially binding* interpretation of the Constitution or its laws."[73] Nowhere does the Constitution assign that power to Congress.

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[70] *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).
[71] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (citation omitted).
[72] *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction."); Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006) (stating that "*Chevron* rests on a fiction" that is "not at all easy to defend"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 192 (1998) ("*Chevron* is actually an aggressive fashioning of judge-made law by the Court."); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction.").
[73] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (emphasis added). Of course, the Executive has the power to interpret duly enacted laws, since that is an inevitable part of executing them. But that is quite different

Rather, it is inherent in the judicial power to "say what the law is."[74] As Alexander Hamilton wrote in *Federalist No. 78*, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[75] "Lacking the power itself, [Congress] cannot delegate that power to an agency."[76] Therefore, the notion that Congress can make an agency the "authoritative interpreter"[77] of federal law not only is contrary to the text and structure of the Constitution; it is incoherent. Congress surely cannot delegate a power that it does not possess.

There is also a strong argument that *Chevron* and *Seminole Rock* violate Article III even apart from nondelegation concerns. This view was first articulated by Professor Philip Hamburger[78] and has been embraced recently by Justice Thomas. "Those who ratified the Constitution knew that legal texts would often contain ambiguities," and "[t]he judicial power was understood to include the power to resolve these ambiguities over time."[79] But along with the judicial power came a duty to exercise independent judgment, "to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them . . . from the political branches, the public, or other interested parties."[80] And to preserve judges' independent and impartial judgment, the Constitution gives the federal judiciary life tenure and salary protection, as Hamilton noted in *Federalist No. 79*.[81]

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from the power to interpret laws *with binding force upon the judiciary*, a power the Constitution assigns to the Supreme Court alone.

[74] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[75] THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[76] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).

[77] *Brand X*, 545 U.S. at 983.

[78] *See* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. (forthcoming).

[79] *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).

[80] *Id.* at 1218.

[81] *Id.* ("Because 'power over a man's subsistence amounts to a power over his will,' [Hamilton] argued that Article III's structural protections would help ensure that judges fulfilled their constitutional role.").

Under this view of Article III, the deference doctrines are an impermissible abdication of judicial duty.[82] When a judge defers to an agency's interpretation of an ambiguous statute or regulation, the judge relinquishes his independent judgment and subordinates his views to those of the agency, which does not have the protections required by Article III—life tenure and salary protection—for the exercise of judicial power. As Justice Thomas has concluded, "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns."[83]

B. Article I. To the extent that *Chevron* and *Seminole Rock* are based on a supposed implicit congressional delegation of legislative power to agencies, their validity must be assessed under Article I's exclusive grant to Congress of *all* legislative power. To be sure, the nondelegation doctrine has lain dormant since the 1930s and, as discussed above, the Supreme Court's repeated approval of broad delegations of legislative power to administrative agencies has been one of the principal contributing factors to the rise of the modern Administrative State and the sweeping power it wields today. The Supreme Court, however, has never formally overruled the nondelegation doctrine. Indeed, at least some Justices have expressed the desire to breathe new life into the nondelegation doctrine,[84] and I would welcome this development. But regardless of whether the *Supreme Court* chooses to enforce the Constitution's distinction between executive and legislative power, *Congress*, of course, retains the power—and, I believe, the obligation—to recognize the constitutional problem posed by agencies wielding legislative

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[82] *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Perez*, 135 S.Ct. at 1217–20 (Thomas, J., concurring in the judgment).
[83] *Perez*, 135 S.Ct. at 1220 (Thomas, J., concurring in the judgment).
[84] *See, e.g.*, *Association of American R.R.*, 135 S. Ct. at 1237 (Alito, J., concurring); *id.* at 1251–52 (Thomas, J., concurring in the judgment); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672–688 (1980) (Rehnquist, J., concurring in the judgment)

power and to itself maintain the constitutional boundaries between legislative and executive power.[85]

C. Due Process. At the core of the Fifth Amendment's guarantee of due process is the bedrock principle that the Government cannot deprive a person of life, liberty, or property unless (1) Congress has authorized such deprivation pursuant to a law that preexisted the deprivation and (2) an independent judiciary has accorded the person all rights guaranteed to him under law.[86] *Chevron* and *Seminole Rock* flout this traditional view of due process by permitting the agency to serve as lawmaker, prosecutor, and judge.

Although this due process problem inheres in both the *Chevron* and the *Seminole Rock* doctrines,[87] it is especially pronounced in the *Seminole Rock* context. *Seminole Rock* permits an agency to issue a regulation (lawmaking power), authoritatively interpret the regulation (judicial power), and enforce the regulation (executive power). Further, *Seminole Rock* allows the agency to circumvent the limitations placed on it by the APA's rulemaking procedures. Since an agency's interpretation of its own regulations is not subject to the APA's notice-and-comment procedures, the agency can effectively write a new regulation while bypassing the APA's limitations on its power.[88] *Seminole Rock* thus gives the agency a powerful incentive first to "speak vaguely and broadly" in its written regulation, then to "interpret" its regulation (without

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[85] *See Michigan*, 135 S. Ct. at 2713–14 (Thomas, J., concurring).
[86] Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1677–80, 1681–1726 (2012); Matthew J. Franck, *What Happened to the Due Process Clause in the* Dred Scott *Case? The Continuing Confusion over "Substance" versus "Process,"* AM. POL. THOUGHT at 120–30 (Winter 2015).
[87] *See* Hamburger, *supra* note 78.
[88] *Id.*; *see also Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment."); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011); Manning, *supra* note 61, at 655–60.

notice-and-comment), and finally to apply its interpretation retroactively,[89] a danger that the Supreme Court has recognized.[90] Such a scheme is ripe for abuse,[91] since the agency—as both lawmaker and interpreter—will get to decide what conduct is permitted or prohibited on an ongoing basis. Imagine, for instance, that Congress had the power both to ambiguously define a crime in the first instance and then to authoritatively determine, *post hoc*, whether particular conduct constitutes the crime: such sweeping power would be perilous indeed for any political opponent of a current congressional majority. It was to avoid precisely such abuses that our Constitution separated the executive, legislative, and judicial powers.

IV. Judicial Deference and the APA

Not only are *Chevron* and *Seminole Rock* contrary to the Constitution; they irreoncilablewith the original design of the APA. Section 706 of the APA provides, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[92] As Justice Scalia observed last year, "[Section 706] thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in

[89] *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

[90] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) ("Our practice of deferring to an agency's interpretation of its own ambiguous regulations . . . creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit . . . ."); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

[91] *Seminole Rock* is especially susceptible to abuse because, unlike *Chevron*, the Court has generally not imposed limitations on the *kinds* of agency interpretations that qualify for deference. In *Mead*, the Court held that *Chevron* deference only applies to a certain class of formal agency interpretations, such as adjudications or notice-and-comment rulemaking, but not to more *ad hoc* statements, such as U.S. Customs Service tariff classification letters. 533 U.S. at 229–34. The Court has imposed no such limitation on *Seminole Rock* deference, leading to the extraordinary result—demonstrated by *Auer* itself—that the Court has deferred even to an agency's litigating positions, such as interpretations taken in an *amicus* brief. *See Auer*, 519 U.S. at 461–63; *see also Perez*, 135 S. Ct. at 1214 (Thomas, J., concurring in the judgment).

[92] 5 U.S.C. § 706.

statutes and regulations."[93] After all, the statute says that the reviewing court "*shall* decide *all relevant questions of law*." The language is imperative, commanding that courts are not to permit *anyone else* to decide questions of law. The interpretation of a statute or regulation is indisputably a question of law.[94] To make this point even more explicit, the statute specifically requires courts to "interpret constitutional and statutory provisions" and "determine the meaning . . . of the terms of an agency action," such as a regulation.

This statutory mandate cannot be squared with *Chevron* and *Seminole Rock*. When a court defers to an agency's interpretation of an ambiguous statute or regulation, the agency, not the court, is deciding the relevant "question[ ] of law," "interpret[ing]" the "statutory provision[ ]," or "determin[ing] the meaning" of a regulation. "So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says."[95] Indeed, the Supreme Court has expressly stated that when a court defers under *Chevron*, it is *not* deciding the meaning of the statute; rather, it is acknowledging the *agency's* role as the "authoritative interpreter" of the statute.[96] And in the context of interpreting regulations, the same is true of *Seminole Rock* as well. Both *Chevron* and *Seminole Rock* are thus "[h]eedless of the original design of the APA."[97]

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[93] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
[94] *See, e.g.*, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) ("Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard.").
[95] *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (emphasis in original).
[96] *Brand X*, 545 U.S. at 983 ("Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.").
[97] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Some scholars have pointed out that judicial deference to agencies conflicts with Section 706 only if the agency is understood to be exercising *interpretive* authority. If the agency is instead understood to be exercising delegated *legislative* power to "fill any gap left" in the statute or regulation, then the agency's regulation or interpretive rule—within the boundaries of reasonableness—is the equivalent of lawmaking. Under that view, the agency is not deciding any questions of law: it is *legislating*, and the courts, by sustaining the agency's action, are simply acknowledging that the agency had authority to legislate as

V. Abrogating *Chevron* and *Seminole Rock*

Judicial deference to the Administrative State has always been controversial. Even before *Chevron*, Congress debated proposals that would have directed courts to review agency statutory interpretations without deference.[98] Among scholars and jurists alike, there has been sustained criticism of the legitimacy of both *Chevron*[99] and *Seminole Rock*,[100] and that criticism has now reached the point where even proponents of these two doctrines have begun to acknowledge their questionable underpinnings.[101] Indeed, with regard to *Seminole Rock*, at least, the criticism spans the jurisprudential spectrum, from Justice Thomas to Justice Ginsburg.[102] The time is ripe for congressional action to enforce the original design of the APA and, more important still, to restore the structural constitutional boundary between courts and administrative agencies.

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it did, not "deferring" to an agency's interpretation. This response is too clever by half, not only because it "runs headlong into the teeth of Article I's [Vesting Clause]," *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring), but also because, even if the deference doctrines do not *expressly contradict* the APA, they certainly flout the *original design* of the APA, as evidenced by the APA's clear textual command that courts "decide all questions of law." It is implausible to say that Section 706 contemplated the esoteric distinction that scholars have put forward in defense of *Chevron* and *Seminole Rock*.

[98] *See* discussion of Bumpers amendment, *infra*.

[99] *See, e.g.*, *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *Perez*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in the judgment); *see generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

[100] *See, e.g.*, *Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212–13 (Scalia, J., concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring); *id.* at 1342 (Scalia, J., concurring in part and dissenting in part); *Christopher*, 132 S. Ct. at 2168 (criticizing *Seminole Rock* for incentivizing the issuance of ambiguous regulations to empower agencies); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 256–59 (2006) (Kennedy, J.) (refusing to defer under *Seminole Rock* where a regulation did "little more than restate the terms of the statute itself"); Stephenson & Pogoriler, *supra* note 88, at 1459–66; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1184 (2008); Manning, *supra* note 61, at 631–96.

[101] *See, e.g.*, *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

[102] Justice Ginsburg joined Justice Thomas's dissent in *Thomas Jefferson University v. Shalala*, which noted that *Seminole Rock* incentivizes the issuance of vague regulations that maximize agency power and deprive parties of adequate notice regarding the state of the law. *See* 512 U.S. at 525 (Thomas, J., dissenting).

As noted earlier, *Chevron* and *Seminole Rock* are "judge-made doctrines of deference."[103] And regardless of one's views about their validity under the APA or the Constitution, they are certainly not *required* by any statute or constitutional provision.[104] Congress can, therefore, abrogate or otherwise modify *Chevron* and *Seminole Rock* by statute.

Chevron and *Seminole Rock* are sometimes characterized as standards of judicial review,[105] and, if that is so, Congress has power to prescribe a different standard of review as a necessary and proper means of carrying into execution both its own statutes and the judicial power.[106] In fact, Section 706 of the APA is *itself* a standard of review for agency action,[107] and just as Congress had the power to enact Section 706 in the first place, it has the power to restore that statute's original design by abrogating the deference doctrines.

Alternatively, some have argued that *Chevron* and *Seminole Rock* can be viewed as rules of statutory interpretation.[108] But because these doctrines, by their own terms, purport to be "rooted in a background presumption of congressional intent,"[109] Congress has the power to rebut any presumed, implicit delegation of interpretive discretion by declaring its contrary intent

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[103] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
[104] *See supra* note 49.
[105] *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (describing *Chevron* as a standard of review).
[106] Michael Stokes Paulsen, *Abrogating* Stare Decisis *by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1590–91 (2000) ("At a minimum, the Necessary and Proper Clause permits Congress to proscribe any procedure or practice of courts that impairs the faithful exercise of '[t]he judicial Power' and to prescribe rules and procedures conducive to the faithful exercise of that power." (alteration in original)).
[107] *United States v. Bean*, 537 U.S. 71, 77 (2002); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 375 (1989); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985).
[108] Rosenkranz, *supra* note 49, at 2129–31; *Perez*, 135 S. Ct. at 1214 n.1.
[109] *City of Arlington*, 133 S. Ct. at 1868 (*Chevron*); *Martin*, 499 U.S. at 151 (*Seminole Rock*); *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

by statute.[110] The Supreme Court recognized this authority in *United States v. Mead Corp.*, which held that *Chevron* deference applies only where the statutory text indicates that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[111] There can be little dispute, then, that "[i]f Congress wanted to repudiate *Chevron*, it could do precisely that,"[112] and the same is no less true of *Seminole Rock*.[113]

Indeed, the Senate has previously passed legislation attempting to abrogate these deference doctrines. Even before *Chevron*, courts frequently deferred to agency interpretations of statutes,[114] and *Seminole Rock* had been applied by the Court in decisions prior to that time as well.[115] In response to the emergence of judicial deference to agencies, Democratic Senator Dale Bumpers of Arkansas—who passed away earlier this year—introduced a bill in 1975 that would have amended Section 706 of the APA to, among other things, make clear that "the reviewing

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[110] Lovejoy, *supra* note 49, at 900 ("No judicial rule of good decisionmaking can prevail over a clear command of Congress, so . . . any presumption of congressional intent should be rebuttable by a clear congressional statement to the contrary."); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 872–73 (2001) ("[I]f *Chevron* depends upon a presumption about congressional intent, then Congress has the power to turn off the *Chevron* doctrine when it wants. A presumption of congressional intent is obviously just that—a presumption— and must give way to evidence that Congress harbored a different intent.").

[111] *Mead*, 533 U.S. at 229.

[112] Sunstein, *supra* note 72, at 2589; *see also Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (describing the conflict between Section 706 and *Chevron* and stating that "[t]he problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 884 (7th Cir. 2002) (Easterbrook, J., concurring in part and concurring in the judgment) ("Congress can choose to delegate, or not, statute-by-statute or through framework laws such as the APA; it could undo *Chevron* across the board if the doctrine functioned as kryptonite to its enactments."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1031 (1992) ("As previously indicated, I think that Congress has the constitutional power to direct courts to abandon the *Chevron* approach."); Laurence H. Silberman, Chevron—*the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990) ("Congress could reverse *Chevron*'s presumption generically by amending the Administrative Procedure Act (APA).").

[113] It is also worth noting that the Court itself has made exceptions to *Chevron* that would be difficult to reconcile with the notion that *Chevron* or *Seminole Rock* are constitutionally required. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (declining to apply *Chevron* to "a question of deep 'economic and political significance' that is central to [a] statutory scheme" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 2000)).

[114] *Chevron*, 467 U.S. at 844 & nn.13–14 (collecting cases).

[115] *See, e.g.*, *Udall*, 380 U.S. at 16–17.

court shall decide ***de novo*** all relevant questions of law."[116] Senator Bumpers explained that the amendment was necessary because "much of the power customarily exercised by these three original branches has been taken over by what in truth amounts to a fourth branch of government, the administrative branch, a branch that is not elected by anyone and, unlike the judiciary, is not insulated from political influence."[117] The amendment was also introduced in the House by then-Congressman Chuck Grassley (R-IA), who later became a Senate co-sponsor. The House Judiciary Committee favorably reported the amendment in 1980, and the Senate passed a version of the amendment in 1981 as part of the Regulatory Reform Act.[118] Although the amendment never became law, this previous legislative initiative demonstrates the Senate's bipartisan recognition of the dangers posed by judicial deference to the Administrative State. And those dangers have only grown more pressing with the passage of time.

It should come as no surprise that I strongly believe that Congress should pass legislation to abrogate *Chevron* and *Seminole Rock*. Congress could do so simply by amending Section 706 to make explicit (or rather, even more explicit) that courts must determine the meaning of regulations and statutes *de novo*, without deference to any administrative agency. Such an amendment would reaffirm the original design of the APA in language too plain to be ignored or evaded by the courts, and it would correct the ongoing violations of the Constitution sanctioned by the *Chevron* and *Seminole Rock* doctrines.

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[116] 123 Cong. Rec. S639 (daily ed. Jan. 10, 1977) (statement of Sen. Bumpers) (amendment in bold).
[117] 121 Cong. Rec. S29,956 (daily ed. Sept. 24, 1975) (statement of Sen. Bumpers).
[118] *See* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 5–9 & n.10 (1985).

CONCLUSION

The *Chevron* and *Seminole Rock* doctrines of judicial deference are at war with the structure of our Constitution and with the text and original design of the APA. Congress should exercise its constitutional authority to abrogate them.

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Before the
United States Senate
Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

"Examining Agency Use of Deference, Part II"
March 17, 2016

Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, it is an honor to appear before you today. My name is Michael Herz. I am the Arthur Kaplan Professor of Law at Yeshiva University's Cardozo School of Law. I have been teaching and writing about administrative law and related subjects for almost three decades. My published scholarship includes several articles on the topic of today's hearing, the so-called "*Chevron* doctrine." I am also a former chair of the ABA's Section of Administrative Law and Regulatory Practice and a Public Member of the Administrative Conference of the United States.

When the Supreme Court's decision in *Chevron U.S.A., Inc. v. NRDC*[1] was yet young, I wrote an article entitled *Deference Running Riot*.[2] The title borrows from Justice Cardozo's famous concurrence in the *Schechter Poultry* case, which was pretty much the last, and almost the first, time that Supreme Court held that a congressional statute was an unconstitutional delegation. Distinguishing the statute in question from others the Court had upheld, Justice Cardozo objected: "This is delegation running riot."[3] Congress had a constitutional responsibility to legislate, and here it had handed that authority over, lock stock and barrel, to the executive branch and members of the regulated industry.

Chevron contains the seeds of a similar handover of constitutionally assigned responsibility. Just as Congress is to legislate, so the courts are to interpret, apply and enforce Congress's decisions in the context of litigated disputes. That is both the constitutional arrangement and the directive of the Administrative Procedure Act.[4] Were a court simply to throw up its hands and say, "we find this statute confusing, so we leave it to the agency to interpret it," that would indeed be deference running riot. My concern in 1992 was that *Chevron* was being read to impose that sort of abdication of the essential judicial role. I argued for a measured understanding of *Chevron*. On this reading, the task of enforcing Congress's decisions belongs

[1] 467 U.S. 837 (1984).

[2] Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under* Chevron, 6 Admin. L.J. Am. U. 187 (1992).

[3] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

[4] 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms oaf an agency action.").

emphatically to the courts, but the task of making policy where Congress has *not* made a decision belongs to agencies.

As things have turned out, my title was misplaced, a sort of sensationalist fear-mongering. Deference has not run riot. While the doctrine is messy and inconsistently applied, in fact there is nothing to fear about *Chevron*. In this testimony I will explain why. If Senate testimony had titles, mine would be "What *Chevron* Is Not." The following sections discuss various possible but unfounded objections to *Chevron*.

So, *Chevron* is not . . .

1. Judicial Abdication

One challenge in discussing *Chevron* is that the doctrine is somewhat contested. Of course, it is easy to repeat the two-step test; the *Chevron* formulation is almost nauseatingly familiar: in situations when the case applies (itself a confusing question), the court must first determine whether Congress has spoken to the question at issue; if it has, there the matter ends; if it has not, and the statute's meaning is unclear, then the court must accept any reasonable agency interpretation. But how this over-familiar admonition actually plays out is much debated and the thousands of decisions are not all perfectly consistent with one another.

The actual impact of *Chevron* and the extent to which it shifts power from the judiciary to the agencies depends on (a) how often it applies, (b) how capacious step one is, and (c) how hard a look the agency interpretation gets in step two. Thus, were *Chevron* to apply any time there is an authoritative agency interpretation of a statute, and were courts to abandon their own efforts to determine the statute's meaning in the face of any ambiguity, and were step two to be a pure rubber stamp, then *Chevron* would be consequential indeed. That was the approach to *Chevron* I feared in 1992. But it is not in fact the reading *Chevron* has generally received.

First, the Supreme Court has developed a complicated set of doctrines, commonly referred to as "*Chevron* step zero," that control when *Chevron* kicks in at all. The mere existence of an agency interpretation does not trigger *Chevron*. The seminal case is *United States v. Mead Corp.*,[5] which holds that *Chevron* applies only when Congress has delegated authority to make rules with the force of law and the agency has acted pursuant to that authority. That test has been a source of confusion and complexity from the outset.[6] Moreover, *Mead* does not exhaust the circumstances where *Chevron* does or does not apply. Sometimes *Chevron* applies even though the *Mead* test is not met,[7] and sometimes it does not apply even though it is. The most prominent recent example of the latter is last Term's Affordable Care Act case, *King v. Burwell*,[8]

[5] 533 U.S. 218 (2001).

[6] See Adrian Vermeule, Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 347 (2003) (describing lower court application of *Mead* as "flawed or incoherent" and tracing those defects "to the flaws, fallacies, and confusions of the *Mead* decision itself").

[7] See, e.g., Barnhart v. Walton, 535 U.S. 212, 217-22 (2002) (applying *Chevron* to an agency rule adopted without notice and comment).

[8] 135 S. Ct. 2480 (2015).

where the Court found *Chevron* inapplicable, without even mentioning *Mead*, because the question at issue was so consequential. This is a messy and frustrating body of doctrine and I do not mean to defend or explain it. The key point is that there are a large number of situations in which an agency has expressed an understanding of the meaning of a statute that is before a court and *Chevron* simply has no bearing.[9]

Second, courts should take a fairly capacious view of step one. That is, they should *not* flee to step two as soon as any ambiguity was found. Statutory texts are often unclear, judges are used to wrestling with ambiguous statutes, and any litigated case will involve one. After all, most applications of a statute don't give rise to disputes, most disputes don't become lawsuits, and most lawsuits are not litigated to judgment. If a matter gets that far, there will almost always be two (or more) plausible readings of a statute. If that alone dictated deference, every *Chevron* case would be a step two case. But, as the author of *Chevron*, Justice Stevens, later admonished: "The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference."[10] Courts should take that admonition to heart, lingering in step one, so to speak. I am not aware of any comprehensive empirical work that actually counts to see what percentage of *Chevron* cases is decided under step one and what percentage under step two.[11] But in a sizeable portion, the judges are sufficiently confident that they know what Congress actually decided that they uphold, or set side, the agency action in step one.

Third, step two is not a complete rubber stamp. To be sure, it is *something* of a rubber stamp. Agencies almost always prevail in step two, and of the three steps it is here that the "running riot" version of *Chevron* is closest to reality. But that does not mean that here the courts have handed *the judicial role* over to agencies. To the contrary. The reason that strong deference is appropriate in step two is that the issues are not legal ones. Courts get to step two when law gives out. As Justice Stephens wrote in *Chevron* itself, strenuous efforts to determine what Congress had decided yielded nothing; law had given out. It was impossible to say that the bubble policy either did or did not violate the Clean Air Act. At that point, the business of *interpretation*, the business of judges, was over. As Justice Stephens wrote:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges--who have no constituency--have a duty to respect legitimate policy choices made by those who do.[12]

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[9] See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L. J. 1083 (2008) (reviewing over 1000 Supreme Court cases decided between 1984 and 2005 that involved agency interpretations of federal statutes and finding that the Court applied *Chevron* in only 8.3% of those decisions).

[10] Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting).

[11] A study of court of appeals decisions in 1995 and 1996 found that 38% of cases were resolved in step one and 62% in step two. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Court of Appeals*, 15 Yale J. on Reg. 1, 30-31 (1998). My guess is that in more recent years those numbers have shifted somewhat toward step one.

[12] *Chevron*, 467 U.S. at 866.

On this understanding, *Chevron* does not transfer judicial authority to the agencies. Rather, it preserves judicial authority to interpret congressional commands, but also insists that courts respect the statutory allocation of policymaking authority to agencies.

Let's retreat to first principles for one minute. The Constitution anticipates the creation of a federal bureaucracy, but it does not itself create any departments. Agencies are creatures of statute. Accordingly, they only have whatever authority Congress has given them, and they must comply with whatever restrictions Congress has imposed. Numerous mechanisms are in place to ensure that agencies operate within those restrictions, including the existence of agency General Counsels, the opportunity to get an opinion from the Department of Justice, and congressional oversight. But the most important, of course, is judicial review of agency action. It is the essential function of the courts to ensure that agencies operate within congressionally established limits. If the courts abandoned that role, it would be cause for serious concern.

But that is not what *Chevron*, properly understood, requires. As long as Congress has in fact decided something, it is the duty of the judiciary to abide by and enforce that decision. That is step one. There can be a tendency to conclude that because Congress has not decided everything, it has not decided anything. That temptation should be resisted; it is the obligation of the courts to respect and enforce what Congress has actually done. But for many and familiar reasons, Congress always and necessarily leaves some things undecided. In executing congress's laws, the agency must fill in some gaps. Of course, courts *could* fill in those gaps, and could pretend they were "interpreting" a statute when they did so, but that would be a function. Precisely because *Chevron* step two kicks in when law gives out, the decisions here are ones of policy rather than interpretation. The court will determine what the statute must mean, and what it cannot mean; with the range of permissible interpretations between those two boundaries, the decision is best made by agencies rather than courts, for just the reasons Justice Stevens gave in *Chevron*.

2. **Unconstitutional**

The foregoing makes quite clear that *Chevron* does not involve the unconstitutional shifting of judicial power to the executive branch. In the more than three decades since the decision was handed down, very few have argued that it is constitutionally problematic. But at least on very prominent voice recently took exactly that position: Supreme Court Justice Clarence Thomas. Concurring in *Michigan v. EPA*,[13] Justice Thomas asserted that the *Chevron* doctrine violates either Article I or Article III. With regard to the latter, he objected that *Chevron* "wrests from Courts the ultimate interpretive authority to 'say what the law is,' and hands it over to the Executive."[14] Viewed as an allocation of "interpretive authority," *Chevron* deference "precludes judges from exercising" the constitutionally required "'independent judgment in interpreting and expounding the laws.'"[15] For constitutional purposes, and in reality, that just is not happening.

[13] 135 S. Ct. 2699 (2015).

[14] *Id.* at 2713 (Thomas, J., concurring) (quoting Marbury v. Madison)

Courts retain primacy in *interpretation*, they have the final word on what it is Congress has actually decided; the agency's views matter but are not dispositive and thus the judicial power has not been ceded to another branch. Where courts must defer is when the agency is making a policy decision within the scope of its delegation, within its *Chevron* space.[16] That is not a judicial task.[17]

3. Out of control

Section one set out an understanding of the *Chevron* doctrine in which courts continue to fulfill their essential task without giving away the store. One might still ask whether courts *in fact* are doing so, whatever the "right" understanding of the decision is. In general, the answer is that *Chevron* has not worked a major shift of decisionmaking authority from the courts (or from Congress via the courts) to administrative agencies. There have of course been individual decisions applying *Chevron* in which a court has been too deferential (as there have been decisions where courts have been not deferential enough). Any legal doctrine will vary in its application. But overall, it is striking how little impact *Chevron* has had. We simply have not seen a major shift in outcomes. The courts are not as deferential to agencies as all the fuss about *Chevron* would make it seem.

This is emphatically true at the Supreme Court level. Scholars have repeatedly confirmed that the Supreme Court has not been more deferential to agency interpretations since *Chevron* was decided than it was before. Often the Court cites *Chevron*, but stays within step one and does not defer; sometimes it does not cite *Chevron* at all, even when upholding the agency; sometimes it cites *Chevron* and gives lip service to deference, but interprets the statute completely on its own.[18]

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[15] *Id.* at 2712 (Thomas, J., concurring) (quoting Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015).

[16] On the idea of "*Chevron* space," see Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them* "Chevron *Space" and* "Skidmore *Weight"*, 112 Colum. L. Rev. 1143 (2012).

[17] In fact, Justice Thomas seems to agree with this understanding of what is going in *Chevron* step two:

> In reality, . . . agencies "interpreting" ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as Chevron itself acknowledged, they are engaged in the "'formulation of policy.'" Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.

Michigan v. EPA, 135 S. Ct. at 2712-13 (Thomas, J., concurring). Of course, for Justice Thomas this avoids the Article III objection but smacks squarely into the Article I objection. That is, he contends that for the agency to regulate private conduct on the basis of its own understanding of sound policy make legally binding rules on the basis of its own policy judgments is a usurpation of legislative authority, and for Congress to authorize its doing so is an unconstitutional delegation of power constitutionally reserved to Congress. That is a matter beyond the scope of my testimony. Suffice it to say that Justice Thomas's views on the nondelegation doctrine represent a pole and find support from no other Supreme Court Justice, current or past.

[18] See Eskridge & Baer, *supra* note 9.

The lower courts present a less clear picture, and it would not be surprising if the Supreme Court—given the nature of its docket and its position in the judicial system—were less deferential than the lower courts. But many people have looked to find a significant *Chevron* effect, an indication of judicial abdication, and been unable to find it.[19] More than that, and rather astonishingly, a growing body of empirical work concludes that standards of review have very little effect on actual outcomes, period. These studies find that courts at all levels of the federal judiciary uphold agency actions about 70% of the time, regardless of the standard of review--*Chevron*, *Skidmore*, arbitrary and capricious, substantial evidence, or de novo.[20]

Notwithstanding this work, I am not quite ready to say that scope-of-review doctrine does not matter. I think *Chevron* probably has some impact, both direct and indirect. The direct effect is that the essential message is one of deference in the face of statutory uncertainty and at least some of the time some judges take that seriously. The indirect effect is more subtle and impossible to measure. But one might predict that *Chevron* would embolden agencies, and there is some empirical evidence to suggest that it has done so.[21] If agencies are taking more aggressive positions than they otherwise would, but are being upheld at the same rate as before *Chevron*, then that means that there has been an actual *Chevron* effect even if agency won/lost rates are unchanged.

Even if those effects are being felt, however, *Chevron* has not transformed the actual practice of judicial review in a fundamental way. It is often honored in the breach or ignored altogether, and courts do frequently conclude that the answer is sufficiently clear to resolve the matter in step one, in which the court is doing all the work.

Finally, it should come as no surprise that *Chevron* is not out of control. As I have recently discussed in print,[22] the *Chevron* doctrine is an instance of self-regulation. It is a judicially imposed limitation on judicial authority, a doctrine through which those in the judging business constrain the activities of the members of their own industry. Accordingly, *Chevron* is heir to the shortcomings and risks that generally bedevil self-regulation: a lack of transparency, the failure to evaluate or monitor performance, and the absence of meaningful penalties for noncompliance. Judges, like most human beings (especially successful human beings holding prestigious positions, possessed of high self-regard, surrounded by sycophants, and blessed with matchless job security), will only go so far in ceding authority. Of course, this or that individual judge may be too deferential, may overregulate, so to speak. But as an overall tendency, judges generally, federal judges in particular, and Supreme Court Justices most of all, simply are not going to be *too* constrained.

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[19] The literature, and the challenges in attempting to measure the decision's impact, are summarized in John Manning & Matthew Stephenson, Legislation and Regulation 772– 75 (2d ed. 2013).

[20] For a summary and discussion, see Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 Admin. L. Rev. 77 (2011).

[21] See Christopher Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703 (2014).

[22] Michael Herz, Chevron *is Dead: Long Live* Chevron, 115 Colum. L. Rev. 1867 (2015).

4. The source of the problem (if problem there is)

If *Chevron* in fact creates a problem, it is a problem that Congress is in a position to cure. The cure is not in legislatively over-riding *Chevron*. To eliminate *Chevron* deference would not advance Congress's interests, for it just shifts discretionary policymaking from the agencies to the courts. That would be a step backwards. Courts lack both the expertise and the democratic mandate to justify policymaking. Furthermore, courts are less subject to congressional oversight than are agencies. And courts can get things wrong—indeed, the premise of a statutory override would be that they got *Chevron* wrong! There would be something ironic were Congress to say that it trusts courts more than agencies and therefore it is rejecting this judicially developed doctrine.

Furthermore, it is inconceivable that the courts would ever wholly abandon the idea that agency interpretations have some weight, that they count. That is an old, old idea. Deference in some form will always be with us. (It is also a sensible idea, but my point here is entirely descriptive rather than normative: one could not get courts to completely ignore agency views even if wanted to.)

Rather, an appropriate congressional response would come in the form of more careful legislation. Of course, for well-known reasons Congress will never write utterly pellucid statutes that anticipate every interpretive problem and possible application. But the foundation of *Chevron* is an honest acknowledgement of how much decisionmaking Congress leaves to agencies, how much it leaves unsaid and undone. If that is a problem, the solution lies with Congress. It is no answer to have *courts* invent statutory meaning rather than having agencies do so. At the end of the day, the best way that Congress can control things is not by attempting to restrict or limit the activities of other players, but by doing its own job well.[23]

5. The cause of irreversible errors

A, perhaps the, central concern about *Chevron* is that courts are too quick to defer. This surely does happen, and when it does the result is that agency policymaking has trumped congressional policymaking. That is undeniably a problem. But it is important to understand that the misstep is not irreversible. The point is not simply that because these are statutory cases Congress can always override any decision. That is true. But it is true more in theory than in practice and in any event applies to any regime of statutory interpretation. Rather, the point is about the peculiarly non-binding nature of an agency win in step two.

Outside of *Chevron* (or in step one, which is the same thing), a judicial interpretation is definitive; unless and until amended, the statute means what the court says it means. When a

[23] Many have argued that one salutary effect of *Chevron* is that it creates an incentive for more precise statutory drafting. See, e.g., Laurence H. Silberman, Chevron – *The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 824 (1980) ("Congress, now aware of the *Chevron* rule and perhaps distrustful of executive branch interpretation, is thereby led to greater specificity in drafting. Such specificity is all to the good. *Chevron* thereby induces more concrete reconciliation of differing policy views during the legislative process, without recourse to the almost moribund unconstitutional delegation doctrine.").

court upholds an agency in step two, however, it is not definitively interpreting the statute. It is merely saying that the statute allows the agency to do what it did. The agency can change its position as circumstances, or administrations, change. That was the situation in *Chevron* itself, and what was implicit in the original decision became explicit in *Brand X*.[24] Thus, *Chevron* lowers the stakes. A win is not so great; a loss not so devastating.

The most recent example of why this matters is *King v. Burwell*.[25] There the Court ruled that health care exchanges established by the Department of Health and Human Services pursuant to the Affordable Care Act were "exchanges established by the state" and therefore someone who purchased health insurance from a federal exchange qualified for tax credits. The Chief Justice's opinion did not rely on *Chevron*; strikingly, it did not merely resolve the issue at step one, it held that *Chevron* simply did not apply. This ruling surprised many people. The relevant statutory provision was in the Internal Revenue Code;[26] the statute granted the IRS authority to write all necessary regulations to implement the provision;[27] the IRS had, through notice-and-comment rulemaking and in express reliance on that authority, issued a regulation directly addressing the legal question in the case.[28] Under *Mead*, this looked like a *Chevron* case. Yet in two succinct paragraphs, the Chief Justice concluded that *Chevron* simply did not apply—the issue was of such "economic and political significance" that it was inconceivable that Congress would simply have left it to the IRS to resolve. So the Court decided the meaning of the statute itself. The result was a definitive interpretation that cannot be changed except by statutory amendment. Had the Court instead applied *Chevron* and upheld the IRS position in step two, the *immediate* outcome would have been the same: federal exchanges would count as state exchanges. But the *long-term* outcome could change; a later administration could almost certainly reverse the rule. Given the high political salience of the ACA and of this decision, and the universal opposition of the Republican presidential candidates to the ACA, were a Republican president elected, Justice Stevens type arguments from accountability would powerfully legitimate such a shift in interpretation.

The point is not that *King* was rightly or wrongly decided, and the highly contested politics around the ACA perhaps make it a special case. The point is only that *Chevron* lowers the stakes in the cases in which it matters, i.e. step two cases. It leaves room for agency change and adjustment. That is not necessarily a bad thing. And, again, this does not mean that either courts or Congress are cut out of the picture; where a court is confident that Congress has in fact decided the matter, its job, *Chevron* or no *Chevron*, is to enforce the congressional decision.

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[24] See National Cable and Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (holding that a decision upholding an agency under step two, and even a judicial decision that *would have been* under step two had there been an agency interpretation to consider, leaves the agency free later to adopt just the opposite position).

[25] 135 S. Ct. 2480 (2015).

[26] I.R.C. § 36B (2012).

[27] Id. § 36B(g) (authorizing IRS to "prescribe such regulations as may be necessary to carry out the provisions of this section"). The IRS already had authority to "prescribe all needful rules and regulations for the enforcement of this title." Id. § 7805(a).

[28] Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,385 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 602).

6. Ideologically skewed

In recent years, doubts about *Chevron* have been stronger on the right than on the left. (Justice Scalia was an important exception, though, as he himself pointed out, his strident support for *Chevron* was made possible in part because he was relatively undeferential in his actual decisionmaking). This hearing itself demonstrates a different ideological valence. That is not a surprise. During a Democratic administration, one would expect Republicans to worry about the effects of *Chevron*; during a Republican administration, one would expect Democrats to worry about *Chevron*.

Though not surprising, the current array of *Chevron* skeptics and *Chevron* enthusiasts is more than a little ironic. In *Chevron*'s early years, in the middle of a 12-year run of Republican presidents, enthusiasm for *Chevron* was high among Republicans. The doubters were almost all Democrats who thought *Chevron* freed Republican administrations to act in ways that the courts would not otherwise have allowed. *Chevron* itself was an example, a Reagan deregulatory measure that had been considered and rejected by Jimmy Carter's EPA. Consider just one example of the partisan array of 30 years ago. In 1986 the ABA Section of Administrative Law hosted a panel to discuss *Chevron*.[29] Professor Ronald Levin, who has testified before this subcommittee, moderated, and two speakers supported *Chevron* and two opposed it. Then head of the Meese Justice Department's Civil Division, Richard Willard, and Judge Kenneth Starr were the *Chevron* enthusiasts; Professor Cass Sunstein and Naderite attorney Alan Morrison the skeptics.[30] This was typical of the debate at the time.[31]

Times have certainly changed. It is impossible to say how much of this shift is the result of short-term ideological preferences. What is important, however, is that an ideological approach to *Chevron* is shortsighted and pointless. "What goes around comes around." *Chevron* increases agencies' freedom of movement. Whether that is good for one side or another in the partisan wars depends largely on who is in the White House, to a lesser extent who is in the judiciary, and at least in part on the political tendency of congressional legislation. In 1984, *Chevron* worked in favor of deregulation; in 2016 it works in favor of greater regulation. We do not know how it will work in 2017. But it would be a mistake for members of either party to embrace or reject *Chevron* on the basis of the policy outcomes it produces.

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[29] Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353 (1987).

[30] *Id.*

[31] Examples of suspicion from the left include William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L.J. 523, 548 (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 456 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987). In contrast, enthusiastic endorsements of a strong reading of *Chevron* from the right include Silberman, *supra* note 23; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. Reg. 283 (1986); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L.J. Am. U. 269 (1988).

In the 1986 panel quoted above, Cass Sunstein observed:

> It is important to keep in mind that there is only a contingent historical association between the current deference to administrative agencies and conservatism. And opposing deference to administrative agencies and being liberal is a contingent position. The institutional judgment ought to be decided, I think, on some ground other than the political one.[32]

That comment remains wholly correct.

[32] Panel Discussion, *supra* note 29, at 379.

Post-Hearing Questions for the Record
Submitted to Neomi Rao
Associate Professor of Law
George Mason University School of Law
From Senator James Lankford

"Examining Agency Use of Deference, Part II"
March 17, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

On The Original Purpose of Chevron

Question: *Chevron* deference attempts to balance competing tensions between the executive and judiciary. On the one hand, proponents of *Chevron* deference argue that it appropriately cabins judicial activism; on the other, critics of *Chevron* worry that agencies are free to wield administrative powers that Congress did not delegate to them, without fear of scrutiny from the courts. What, in your opinion, is the proper balance between these two tensions?

> **Response**: This tension arises largely when open-ended delegations of authority to the executive provide little "law" for courts to interpret. In these circumstances, courts have sometimes deferred to an agency's policy preference, rather than supplying a judicial policy. One possibility for diminishing this tension would be for Congress to legislate with greater specificity, which would provide statutory standards that courts could use when deciding challenges to agency action. Another possibility would be for courts to interpret delegations narrowly or to decline to assume delegation when a statute is silent on a particular question.

On Legislative Action

Question: The Judicial Review Restoration Act amends the APA to clarify that the reviewing court shall decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." This would eliminate both *Chevron* and *Auer* deference. How would agency rulemaking change if judicial deference to statutory provisions and rules were eliminated?

> **Response**: Given the complexity and scope of administration, it is difficult to predict how rulemaking would change if the Judicial Review Restoration Act was enacted. Under current doctrine and judicial practice, courts do not consistently defer to agencies. Eliminating deference altogether, however, could change the legal landscape. Agencies

may respond by ensuring that rulemaking more closely tracks statutory requirements. Faced with greater scrutiny by the courts, however, agencies may also take actions to avoid judicial review by shifting away from formal rulemaking and adjudication. For instance, agencies may increase the use of informal guidance, litigation threats, and other actions that can effectively secure regulatory compliance, but not be easily challenged in court.

Question: An alternative method would be for Congress to institute a *Skidmore*-type standard, where courts are to accept the statutory interpretation that is most persuasive. If, for example, Congress passed such legislation what would be the effect on both the courts and the agencies?

Response: Because the *Skidmore* standard for review of agency action includes many different factors and operates as a standard, not a rule, it is difficult to anticipate how such a standard would be legislated and then to predict how such a statutory standard would affect courts and agencies.

Question: Critics argue that *Chevron* deference rests on an implicit delegation of judicial power to administrative agencies and is also an impermissible abdication of judicial duty." In his concurring opinion in *Perez v. Mortgage Bankers Association*, Justice Clarence Thomas stated that "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." If the courts will not defend their constitutionally granted powers, what, if any, steps should Congress take to prevent an improper transfer of judicial authority to the executive branch?

Response: One way that Congress might prevent a so-called transfer of judicial authority to the executive branch is first to prevent the transfer of legislative authority to the executive branch. The Executive has no inherent lawmaking power and can exercise only those powers conferred by statute or, in some limited cases, by the Constitution directly. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The Executive Power in Article II, however, necessarily includes the power to interpret the laws in the course of implementing and executing them. Such exercises of executive power may be subject to judicial review, in which case the courts have an obligation to "say what the law is." The judiciary exercises the power to interpret laws in the course of deciding "Cases" and "Controversies." The executive and the courts both exercise interpretive power, but in their own spheres. Judicial deference thus may not be a transfer of judicial power, as the executive possesses interpretive power, but deference could in some instances be an abdication of the judicial responsibility to interpret the law.

On the Supreme Court Vacancy

Question: Justice Scalia was a strong proponent of *Chevron*; however, he focused on determining congressional intent under step-one and deferred to agency interpretations less than other justices. What impact does the loss of Justice Scalia have on the current Court's application of *Chevron* deference?

> **Response**: The Supreme Court's recent decisions indicate that at least some justices are rethinking the scope and application of *Chevron* deference, particularly Justices Thomas and Alito. For many years, Justice Scalia was one of the most consistent defenders of *Chevron*; however, some of Justice Scalia's opinions before he passed away suggest he was reconsidering *Auer* and perhaps *Chevron* deference. It is fair to say that the doctrines are currently in flux and will turn on the developing and evolving views of several justices, and, of course, Justice Scalia's replacement.

On King v. Burwell

Question: Chief Justice Roberts declined to apply *Chevron* deference in the challenge to the Affordable Care Act *King v. Burwell*. Writing for the Court, Roberts argued that it was unlikely that Congress would delegate a decision of such "deep economic and political significance" to the IRS. The full impact of this case is yet to be seen, but this "major question" doctrine may prove to be a preliminary step to the *Chevron* doctrine, does this mark a shift in the type of cases where the Court will apply *Chevron*?

> **Response**: *King v. Burwell* builds on and reaffirms earlier decisions suggesting that there is a major question exception to *Chevron*. *King* potentially places more questions outside of *Chevron*'s domain, and leaves those questions for the courts when reviewing agency action. One difficulty here, however, is ascertaining what questions are significant enough to avoid *Chevron*. This inquiry will depend on a case-by-case determination in particular challenges. Another important issue is whether *King v. Burwell* indicates a broader retreat from *Chevron*, or just a further cabining of the doctrine.

On Chevron'*s Impact on the Separation of Powers*

Question: *Chevron* deference rests on an implicit delegation of legislative authority to executive branch agencies, how has the acceptance of increased delegation influenced Congress's role as the legislative branch?

> **Response:** The judicial and political acceptance of open-ended delegations has diminished Congress' legislative power in a number of ways. Most obviously, delegation has shifted even important policymaking decisions to agencies and the President. This

diminishes both the incentives and the ability for Congress to legislate. In light of the growth of the administrative state, Members of Congress might find it easier as individuals to influence administration, rather than undertake the arduous collective task of enacting legislation.

This dynamic has undermined Congress as an institution in relation to the Executive. Congress' power comes from collective lawmaking. Individual members have their particular interests, but they can pursue legislation only through majorities in both the Senate and House of Representatives. If individual lawmakers can pursue their interests outside the lawmaking power, for instance through administrative agencies, this fundamentally erodes the collective Congress. Delegation thus unravels the competition between the political branches and diminishes Congress. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).

Charles J. Cooper
"Examining Agency Use of Deference, Part II"
Written Responses to Senator James Lankford's Questions for the Record
May 9, 2016

1. **QUESTION:** *Chevron* deference attempts to balance competing tensions between the executive and judiciary. On the one hand, proponents of *Chevron* deference argue that it appropriately cabins judicial activism; on the other, critics of *Chevron* worry that agencies are free to wield administrative powers that Congress did not delegate to them, without fear of scrutiny from the courts. What, in your opinion, is the proper balance between these two tensions?

   ANSWER: In my view, the proper balance between these tensions is the one set by the Constitution itself, which vests the judicial power in the federal courts and all legislative powers enumerated in Article I in the Congress. As I explained in my written testimony, the vesting of these powers is exclusive, *see also Department of Transp. v. Association of American Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment), and because *Chevron* is premised on a delegation of either judicial or legislative power to agencies, *Chevron* is contrary to either Article III or Article I. Therefore, regardless of whether one believes that courts *should* act as a greater check on agency power than they currently do, the relevant point is that the Constitution *requires* that courts do so.

   It is true that Justice Scalia, who during most of his life was *Chevron*'s greatest defender on the Court, believed that *Chevron* played a critical role in cabining judicial activism. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) ("We have cautioned that judges ought to refrain from substituting their own interstitial lawmaking for that of an agency. That is precisely what *Chevron* prevents." (quotation marks and citation omitted)). But as the Chief Justice stated in his *City of Arlington* dissent, "*Chevron* is a powerful weapon in an agency's regulatory arsenal" because "Congress often fails to speak to the precise question before an agency," *id.* at 1879 (quotation marks omitted), and with the Administrative State's breathtaking expansion of power since the Progressive Era, *Chevron* effectively gives agencies unchecked authority over large swaths of American life. As between judicial activism and agency autarchy, it is unclear which is the greater threat to American liberty.

   But it *is* clear, in my opinion, that *Chevron* cannot be squared with the Constitution, and that is a conclusive reason for rejecting *Chevron* and restoring the original design of the Constitution.

2. **QUESTION:** The Judicial Review Restoration Act amends the APA to clarify that the reviewing court shall decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." This would eliminate both *Chevron* and *Auer* deference. How would agency rulemaking change if judicial deference to statutory provisions and rules were eliminated?

ANSWER: There can be little doubt that *Chevron* and *Auer* have a dramatic effect on agency rulemaking. As Professor Herz testified, there is empirical evidence that *Chevron* encourages agencies to adopt more aggressive interpretations of statutes than they would otherwise. This empirical evidence confirms what is obvious as a matter of common sense: if there is a non-frivolous argument in favor of an agency-empowering interpretation, the agency has every reason under *Chevron* and *Auer* to adopt that interpretation and take its chances in court.

Few cases so vividly illustrate this problem as *Utility Air Regulatory Group v. EPA*. In that case, the EPA interpreted the Clean Air Act (CAA) to impose permitting requirements on all stationary sources emitting 100 or 250 tons of greenhouse gases per year, depending on the permitting requirement in question. 134 S. Ct. 2427, 2436 (2014). The 100- and 250-ton figures were in the statute itself; EPA was simply applying them to greenhouse gases. However, EPA recognized that its decision to interpret the CAA in this fashion would have "calamitous consequences," such as increasing permit applications from 800 per year to nearly 82,000 and "causing construction projects to grind to a halt nationwide." *Id.* at 2442–43. To remedy this problematic consequence—one that resulted from the EPA's own agency-empowering interpretation of the statute—the EPA announced that it would "tailor" the statute by replacing the 100- and 250-ton statutory thresholds with a 100,000-ton threshold of its own invention. *Id.* at 2444–45. The EPA literally rewrote numerical requirements specified in the statute to suit its own policy purposes.

Fortunately, a majority of the Supreme Court held that even *Chevron* deference cannot authorize such an effort. It affirmed that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445. "It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires . . . permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the bounds of its statutory authority." *Id.* (quotation marks omitted). The Court noted that, instead of changing the statute's requirements—requirements to which Congress and the President had agreed—the agency should have realized that its need to do so signaled "that it had taken a wrong interpretive turn." *Id.* at 2446.

Yet, had just one Justice switched his vote, the EPA would have succeeded in its brazen attempt to rewrite an Act of Congress. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, would have permitted the EPA to read an "implicit exception" into the "less important language" of the statute—that is, "the particular number used by the statute." *Id.* at 2454. In doing so, Justice Breyer noted that the EPA was merely "exercising the legal authority to which it is entitled under *Chevron*." *Id.* at 2453.

The EPA rewrote the indisputable, numerical requirements of a statute, and, because of *Chevron*, its gamble almost paid off. When an agency regulation directly contradicts its authorizing statute, and yet the Court still comes within one vote of sustaining the agency's action, the lesson to the administrative agencies is to seize as much power as possible, confident that they will have a fighting chance in court.

In light of the incentives created by *Chevron* and *Auer*, I believe that, if these doctrines were eliminated, and agency rules were consequently subject to *de novo* judicial review, agencies would be much more cautious about adopting aggressive, agency-empowering interpretations. It is hard to imagine, for instance, that the EPA would have attempted its gambit in *Utility Air Regulatory Group* had it known that the Court would review its interpretation of the Clean Air Act without deference. Therefore, although agencies will almost always try to increase their power when interpreting statutes, they would be more constrained in doing so in the absence of *Chevron* and *Auer*.

3. **QUESTION:** An alternative method would be for Congress to institute a *Skidmore*-type standard, where courts are to accept the statutory interpretation that is most persuasive. If, for example, Congress passed such legislation what would be the effect on both the courts and the agencies?

   ANSWER: The *Skidmore* doctrine states that the weight given to an agency interpretation of its own authority should "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). I agree with Justice Scalia's view that "*Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers." *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

   As I stated in my oral testimony, under *Skidmore*, courts would regard agency interpretations in the same way they view amicus briefs from private parties: as potentially useful resources insofar as they are well-reasoned and persuasive. But just as courts do not defer to amicus briefs from private parties, they would not defer to agencies under *Skidmore*. Therefore, I believe that the effect of imposing the *Skidmore* doctrine in judicial review of agency interpretations should be materially indistinguishable from requiring *de novo* review, and I have explained in my prior answer what I believe the effect of *de novo* review would be on agency behavior.

   However, I am concerned that courts might purport to apply *Skidmore* while effectively smuggling *Chevron* or *Auer* into their analysis. After all, the Court in *Mead* seemed to believe that *Skidmore* requires some form of deference to agency interpretations. *See id.* at 234 ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." (quotation marks and citation omitted)). Insofar as courts would continue to accord deference to agency interpretations under *Skidmore*, the same constitutional concerns present with *Chevron* and *Auer*—though perhaps ameliorated

somewhat—would continue to exist, and agencies would continue to have the same incentives to push the boundaries of their power with aggressive interpretations.

For those reasons, I believe that imposing the *Skidmore* doctrine *should* lead to *de novo* review, with the agency's interpretations prevailing only insofar as they are persuasive, but I am concerned that this might not obtain in reality. *Skidmore* would be better than *Chevron* and *Auer*, but the most secure way to resolve the constitutional problems with deference and to reign in out-of-control agency interpretations is to impose a clear *de novo* standard of review, as the Administrative Procedure Act (APA) was originally designed to do.

4. **QUESTION:** Critics argue that *Chevron* deference rests on an "implicit delegation of judicial power to administrative agencies and is also an impermissible abdication of judicial duty." In his concurring opinion in *Perez v. Mortgage Bankers Association*, Justice Clarence Thomas stated that "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." If the courts will not defend their constitutionally granted powers, what, if any, steps should Congress take to prevent an improper transfer of judicial authority to the executive branch?

   ANSWER: As I made clear in my prepared testimony, I completely agree with Justice Thomas that, insofar as *Chevron* is justified as a delegation of judicial power to agencies, it is at war with Article III, which vests the judicial power exclusively in the federal courts. I also strongly agree with the implied premise of the question: just because the Court has not recognized the constitutional problems with *Chevron* does not mean that Congress has no role to play. Congress, as a coequal branch with an obligation to uphold the Constitution, has a *duty*—within the limits of its own authority—to maintain the separation of powers. *Salazar v. Buono*, 559 U.S. 700, 717 (2010) ("Congress, the Executive, and the Judiciary *all* have a duty to support and defend the Constitution." (emphasis added)); *see also* U.S. CONST., art. VI, cl. 3. For reasons described in my written testimony, it is clear that Congress has the power to abrogate *Chevron* and *Auer* legislatively and require *de novo* review of agency interpretations, and I believe that it should do so.

   Outside of the *Chevron* and *Auer* contexts, there are other significant ways in which judicial power is unconstitutionally transferred to agencies. For example, my written testimony described the effect of the Court's decision in *Crowell v. Benson*, 285 U.S. 22, 46 (1932), which permitted agencies to exercise judicial power subject to review by the courts. Congress could take action against this type of delegation by restricting the domain of agency adjudications, but that is a topic that is beyond the scope of my testimony and is better left for another day.

5. **QUESTION:** Justice Scalia was a strong proponent of *Chevron*; however, he focused on determining congressional intent under step-one and deferred to agency interpretations less than other justices. What impact does the loss of Justice Scalia have on the current Court's application of *Chevron* deference?

ANSWER: Although it is true that Justice Scalia was perhaps the foremost defender of *Chevron* on the Court throughout his career, it is important to note that, in his last full term on the Court, even Justice Scalia expressed significant skepticism about *Chevron*'s validity. In *Perez v. Mortgage Bankers Association*, Justice Scalia explained that Section 706 of the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations," but the Court, "[h]eedless of the original design of the APA," has "held that *agencies* may authoritatively resolve ambiguities in statutes [and regulations]." 135 S. Ct. at 1199, 1211 (Scalia, J., concurring in the judgment) (emphasis in original). Indeed, Justice Scalia even went so far as to suggest that the conflict between the APA and *Chevron* is "perhaps insoluble if *Chevron* is not to be uprooted." *Id.* at 1212. Unfortunately, we will never know whether Justice Scalia would have eventually come around to the view that *Chevron* should be overruled, but his separate opinion in *Perez* clearly stated his increasing discomfort with the legitimacy of *Chevron*. Tellingly, Justice Scalia had become the Court's leading advocate against *Auer* and *Seminole Rock*—which suffer from the same constitutional infirmities as *Chevron*—notwithstanding that he authored the opinion in *Auer*. *See, e.g.*, *id.* at 1212–13; *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., concurring in part and dissenting in part).

The impact of Justice Scalia's untimely death on the current Court's application of *Chevron* is complex. It is true, as your question states, that Justice Scalia rigorously enforced Step 1 and moved on to Step 2 infrequently, thus mitigating the impact of *Chevron* within his own approach to reviewing agency action. Losing the foremost textualist and enforcer of Step 1 on the Court could lead the Court to defer more to agencies under Step 2.

On the other hand, Justice Scalia was the staunchest defender of *Chevron*'s applicability, forcefully criticizing the Court in cases restricting *Chevron*'s scope, *see, e.g.*, *Mead*, 533 U.S. at 239 (Scalia, J., dissenting); *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment), and authoring *City of Arlington v. FCC*, 133 S. Ct. at 1863, one of the most sweeping and troubling expansions of *Chevron*'s domain. The other justices on the current Court have, at times, shown greater willingness to place limits on when *Chevron* applies, *see, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (declining to apply Chevron to "a question of deep 'economic and political significance' that is central to [a] statutory scheme" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 2000)); *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting); *Mead*, 533 U.S. at 218. Without Justice Scalia advocating to the contrary, it is possible that the Court will apply *Chevron* less often.

In sum, while Justice Scalia had an expansive view of *Chevron*'s applicability, he did not often defer under *Chevron*'s Step 2, making it difficult to predict how his absence will affect future *Chevron* cases. Of course, given that there appear to be at least three votes to overrule *Auer*, *see Perez*, 135 S. Ct. 1211 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *Decker*, 133 S. Ct. at

1338–39 (Roberts, C.J., concurring), and given that four justices have expressed serious reservations about agency power under *Chevron*, *see Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting), the future of these deference doctrines will very likely hinge on who replaces Justice Scalia on the Court.

6. **QUESTION:** Chief Justice Roberts declined to apply *Chevron* deference in the challenge to the Affordable Care Act in *King v. Burwell*. Writing for the Court, Roberts argued that it was unlikely that Congress would delegate a decision of such "deep economic and political significance" to the IRS. The full impact of this case is yet to be seen, but this "major question" doctrine may prove to be a preliminary step to the *Chevron* doctrine, does this mark a shift in the type of cases where the Court will apply *Chevron*?

   ANSWER: Yes, it does mark a significant shift in the Court's *Chevron* jurisprudence. The "major questions" doctrine originated with the Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, which refused to defer to the FDA's view that it had statutory authority to regulate tobacco products. The Court rejected the agency's statutory interpretation at Step 1, concluding that the statute and related congressional actions unambiguously precluded the FDA's regulation of tobacco products. It then found its interpretation fortified by the fact that it was unlikely that Congress intended to delegate to the agency "major questions" of "such economic and political significance." 529 U.S. 120, 159, 160 (2000).

   The major questions doctrine had been cited in other cases before *King*, but, as in *Brown & Williamson*, the Court had done so after completing its analysis under Step 1, in order to bolster its view that the statute at issue was unambiguous. *See Utility Air Regulatory Grp.*, 134 S. Ct. at 2444; *cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not, one might say, hide elephants in mouseholes").

   What makes *King* so striking and different from prior invocations of the major questions doctrine is that the Court determined (erroneously) that the statute *was ambiguous* but still declined to apply *Chevron* and, as Professor Gillian Metzger has pointed out, "went out of its way to independently interpret the statute to reach the same result as the agency." Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1778 (2015).

   There are, of course, numerous "major cases"—cases that have a profound impact on our economic and political life—where agencies rely on *Chevron* to support expansive regulatory actions. For example, the EPA's clean power plan regulations—which the Supreme Court has stayed for the time being, *see West Virginia v. EPA*, 136 S. Ct. 1000 (2016)—surely addresses a question of "deep economic and political significance," and the agency's statutory interpretation should not be accorded *Chevron* deference if the courts are faithful to *King*. That the Chief Justice and Justice Kennedy were willing to use the major questions doctrine in *King*, combined with the significant skepticism of agency power voiced by Justices Thomas and Alito, suggests that Justice Scalia's replacement

will likely be decisive in determining whether *King* is regarded as an aberration or as the herald of a new dispensation in *Chevron* cases.

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May 4, 2016

Hon. James Lankford
United States Senate
316 Hart Senate Office Building
Washington, D.C. 20510

Re: Post-Hearing Questions for the Record, "Examining Agency Use of Deference, Part II," March 17, 2016

Dear Senator Lankford,

I am pleased to answer the following post-hearing questions for the record.

Question: Empirical studies have shown that, for most justices, whether they defer to an agency or not hinges largely on political affiliations. Conservative justices defer more frequently when there is a Republican in the White House and liberal justices defer more when there is a Democrat in the White House. What steps should Congress take to ensure that courts review agency action in a neutral manner regardless of who is President?

Answer: At bottom, I think there is very little Congress can do to ensure judicial neutrality. Ideology inescapably affects judicial decisionmaking; there is no direct steps Congress, or others, can take to reduce that effect. It is already the case that the "official version" of the judicial task is one of neutral law-application; that is what *every* judicial nominee promises to do and what most judges think they are doing. So any sort of direct command or exhortation to "be neutral" will be ineffective.

That said, what Congress *can* do is to lessen the effects of or opportunity for ideologically driven judicial decisionmaking. This too is not easy or straightforward. But ideology is most prominent in the face of legal uncertainty. The clearer the legal principles, the less relevant the judge's ideology. (One of the reasons that ideology looks so important is that litigated cases by definition involve settings where there is at least some, and often a great deal of, uncertainty.) In statutory cases, that means drafting with clarity and precision. Of course, that is much easier said than done.

Finally, it is important to understand that the link between judicial decisions and political affiliations is not in any way limited to review of agency decisions. In fact, a doctrine of deference in the face of ambiguity should and probably does *reduce* the overall role of ideology

in review of agency decisions. As you point out, and studies have shown, ideology matters here too; ideology colors all judicial decisionmaking, including on "meta" questions like decisions about how to make decisions. But the question is not whether deference can be applied "neutrally." The question is whether judicial decisionmaking in cases involving unclear statutes would be more, less, or equally "political" absent a deference principle. It is pretty clear that giving judges free reign would not *reduce* the ideological nature of their decisions. It is possible that it would have no effect; my prediction would be that ideology would become more important.

Question: Justice Scalia was a strong proponent of *Chevron*; however, he focused on determining congressional intent under step-one and deferred to agency interpretations less often than other justices. What impact does the loss of Justice Scalia have on the current Court's application of *Chevron* deference?

Answer: For the reasons you give, it is hard to predict the impact of the loss of Justice Scalia on the *Chevron* doctrine. On the one hand, his actual *votes* were not deferential; he was relatively quick to disagree with agencies. The median justice is more deferential, and therefore one would predict an increase in deference. On the other hand, because he was such a strident defender of *Chevron*, and because the basic message of *Chevron* is one of deference, an important and influential voice stressing the need to defer is now gone. These effects may balance each other out. In addition, Justice Scalia was in a minority on some central *Chevron* issues, most notably the continued viability of *Skidmore* and the "step zero" doctrine of *Mead*. On these issues, his departure will likely lead to cementing the majority view rather than shifting it. In short, overall, I would not expect the impact the loss of Justice Scalia to have a significant impact on the current Court's application of *Chevron* deference.

Question: Chief Justice Roberts declined to apply *Chevron* deference in the challenge to the Affordable Care Act *King v. Burwell*. Writing for the Court, Roberts argued that it was unlikely that Congress would delegate a decision of such "deep economic and political significance" to the IRS. The full impact of this case is yet to be seen, but this "major question" doctrine may prove to be a preliminary step to the *Chevron* doctrine, does this mark a shift in the type of cases where the Court will apply *Chevron*?

Answer: In one form or another, the idea that courts should not defer to agencies on "major questions" is an old one, long predating *Chevron*. It is a standard basis on which to distinguish two granddaddy administrative law decisions: *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (deferring to the NLRB on the question whether newspaper sellers were "employees") and *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (refusing to defer on the question whether foremen were "employees"). See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("[In deciding whether to defer to the agency, a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."). On the other hand, though the idea is an old one, it is rarely invoked. One reason *King v. Burwell* has received so much

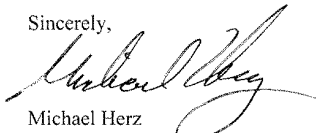
attention is precisely the rarity with which the Court relies on this principle. This one decision alone does not seem to me enough to indicate a trend.

That said, there are two doctrinally striking features of *King v. Burwell* that I think do herald some new disinclination to defer. First, prior major question cases under *Chevron* have invoked the principle as a reason to stay in step one; they acknowledged *Chevron* applied, but did not defer because they were particularly determined to stay in step one for major questions. Examples of this approach include *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In contrast, *King v. Burwell* found that *Chevron* simply did not not apply. In *Chevron*-speak, it was decided at step zero rather than step one. The actual impact of this difference is negligible; either way, the Court determines statutory meaning for itself. But it is new and notable that the Court simply tossed *Chevron* aside altogether rather than operating within its framework, and that implies some hostility to the decision.

Secondly, it is black-letter law that when an agency has interpreted a statute and *Chevron* does not apply then *Skidmore* does. Thus, the agency's views have some weight, they count for something (but maybe not much) even if they do not receive full-fledged *Chevron* deference. Yet the Chief Justice does not even mention *Skidmore* in *King*. It is as if it never occurred to him that another deference regime might be applicable. And this even though *Skidmore* is not especially constraining and it would have *supported* the conclusion he reached. So that too I think reveals some hostility to deference.

I hope these additional comments are helpful, and thank you again for the opportunity to testify.

Sincerely,



Michael Herz
Arthur Kaplan Professor of Law

cc: Hon. Heidi Heitkamp

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